

90-994

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Supreme Court, U.S.
FILED

DEC 10 1990

JOSEPH F. SPANIOL, JR.
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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

LEWIS & COMPANY, LAWYERS,
L. BURKE LEWIS, AMY J. CASSEDY,

Petitioners

vs.

KONSTANTIN THOEREN, PATROLA FILMS, INC.,
PATROLA, G.m.b.H., ADRIANA INTERNATIONAL
CORPORATION, HANS A.-KUNZ, KEMAL ZEINAL-
ZADE, ANTHONY M. MIDGEN, ARIAN FILMS
PRODUCTIONS, LTD., ARTHUR L. MARTIN,

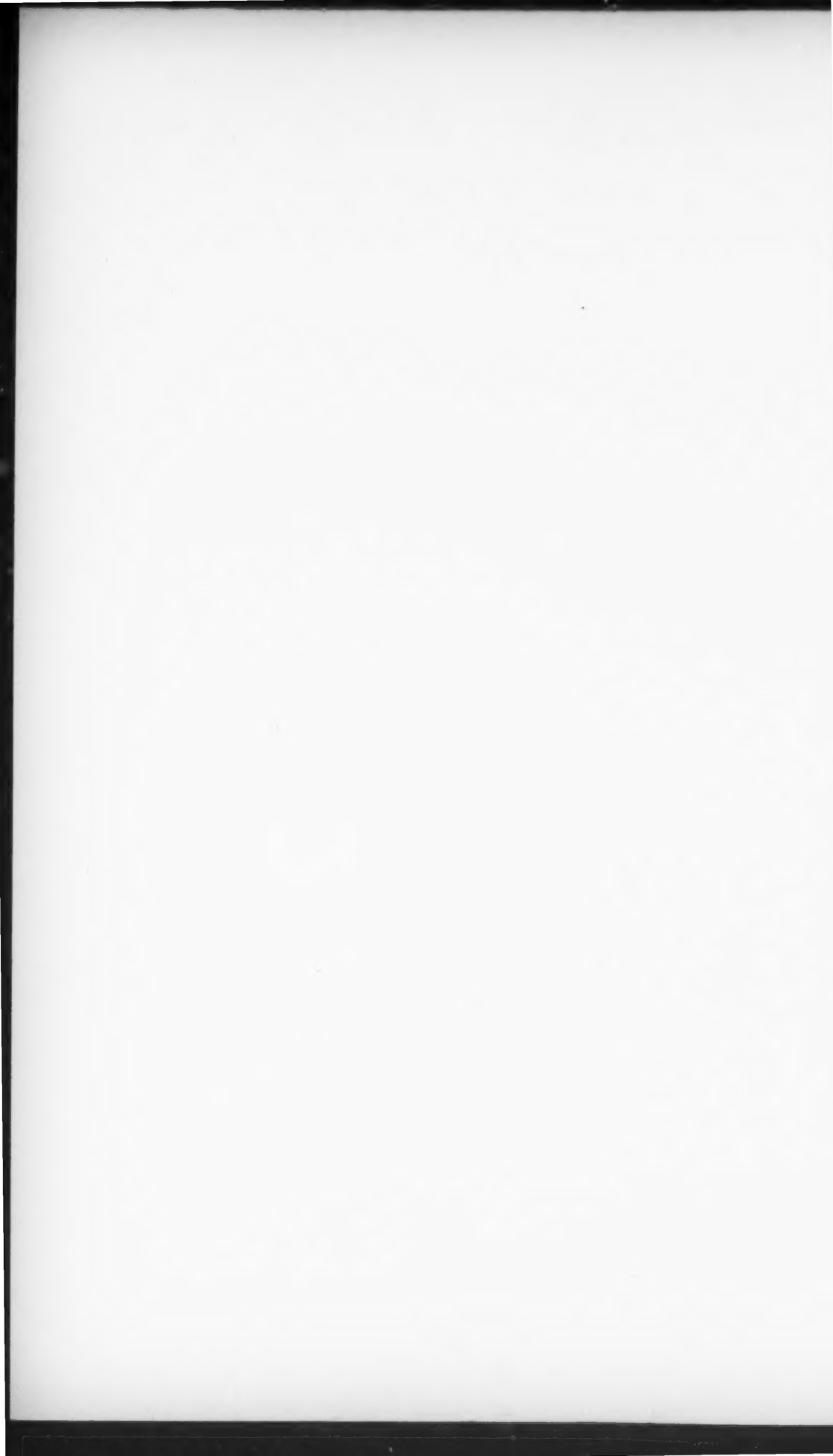
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF
CERTIORARI

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APPENDIX I

OPINION OF THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

Published at 913 F.2d 1406 (9th Cir.1990)

Argued and Submitted June 7, 1990

Decided September 10, 1990

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.	)	88-6424
)	
Plaintiff-)	
counter-defendant/)	
Appellant)	
)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
)	
LEWIS & COMPANY,)	
et. al.,)	
)	
Intervenors/)	
Appellants,)	
)	
KONSTANTIN THOEREN,)	
et. al.,)	
)	
Defendants-)	
counter-claimants/)	
Appellees)	
)	
vs.)	
)	
HANS A. KUNZ, et. al.,)	
)	
Third-party)	
defendants/)	
Appellants.)	
)	

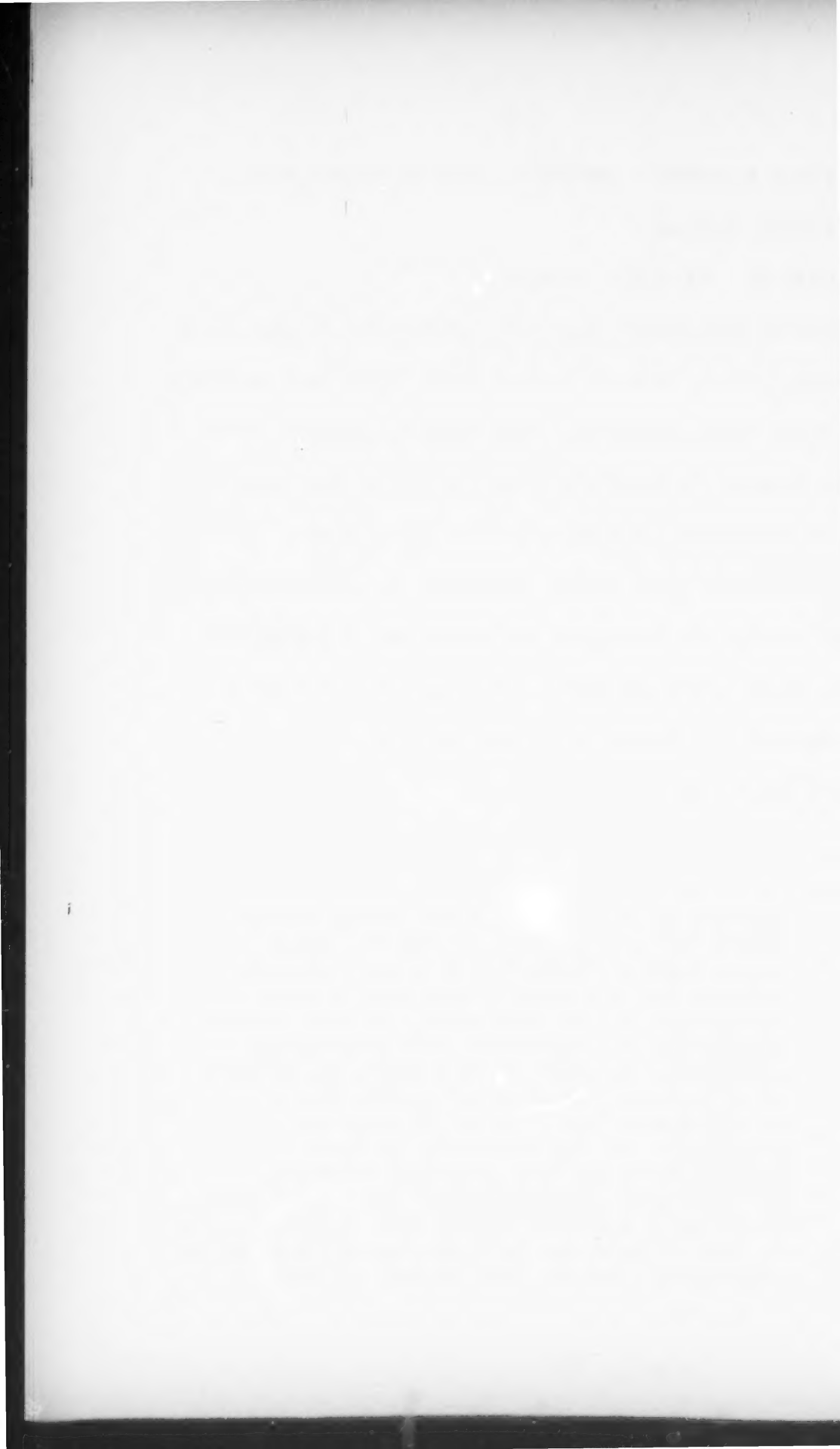


Before ALARCON, BRUNETTI and O'SCANNLAIN,
Circuit Judges.

BRUNETTI, Circuit Judge:

Adriana International Corporation, Arian Film Productions, Kemal Zade, Hans Kunz and Anthony Midgen (collectively "Adriana") appeal from the district court's dismissal of Adriana International Corporation's complaint, striking of all their answers to cross-claims and entry of default judgment as a sanction for discovery abuses. The court entered a judgment in favor of Thoeren for \$8.5 million.¹

¹ During this appeal, appellants fired their attorney, Mr. L. Burke Lewis. Lewis had already filed four opening briefs in the case. Adriana's new attorneys filed the reply brief, which specifically abandons the following arguments raised in the opening briefs: 1) disqualification of Judge Real; 2) disqualification of Thoeren's attorney; 3) impropriety in the appointment of the special master; 4) personal jurisdiction over AFP; and 5) timely service under Fed.R.Civ.P. 4(k) on AFP. Because Adriana abandoned these arguments, we do not address them.



STANDARD OF REVIEW

The imposition of discovery sanctions pursuant to Fed.R.Civ.P. 37 is reviewed for abuse of discretion. *North American Watch Co. v. Princess Ermine Jewels*, 786 F.2d 1447, 1450 (9th Cir.1986). Absent a definite and firm conviction that the district court made a clear error in judgment, this court will not overturn a Rule 37 sanction. *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 279 (9th Cir. 1988). Findings of fact related to a motion for discovery sanctions are reviewed under the clearly erroneous standard. *Id.* If the district court fails to make factual findings, the decision on a motion for sanctions is reviewed de novo. *United States for the Use and Benefit of Wiltec Guam, Inc. v. Kahaluu Construction Co.*, 857 F.2d 600, 603 (9th Cir.1988).

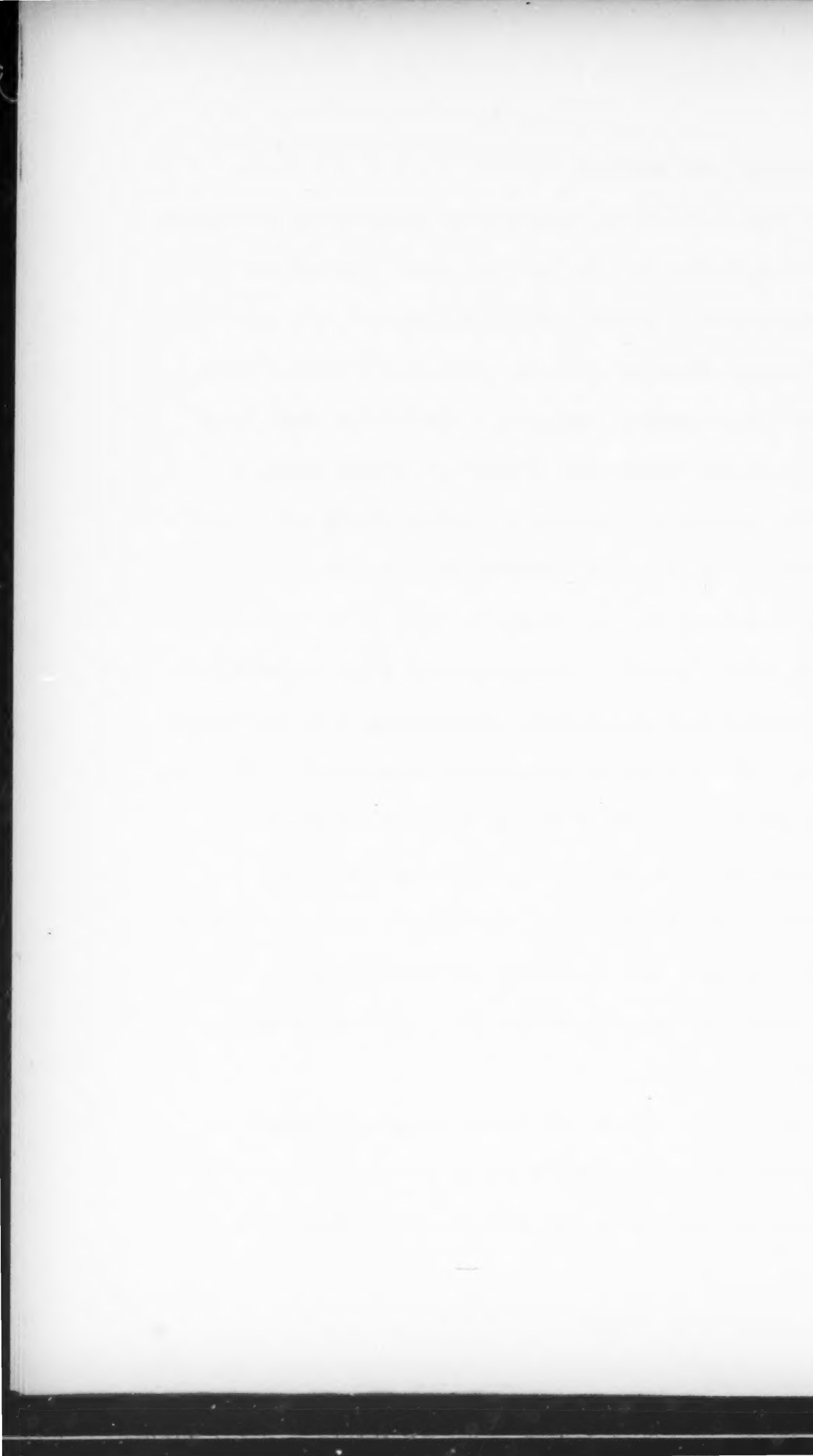
We apply an abuse of discretion standard in reviewing all aspects of a district court's decision in imposing sanctions under Rule 11.

Cooter & Gell v. Hartmarx Corp., --U.S.--, 110 S.Ct. 2447, 2461 L.Ed.2d 359 (1990).

FACTS AND PROCEEDINGS BELOW

The underlying actions in this case involve an oral agreement between Adriana and Thoeren pursuant to which Thoeren was to produce movies in the Soviet Union. As part of this deal, Adriana Corporation was formed. Thoeren was to own 30% of the stock, in addition to receiving a salary. The remainder of the stock was owned by Kunz, Zade and Midgen. All of the Adriana stock was to be held in trust by Adriana Film Productions (AFP), a Bahamian corporation controlled by Zade in which Kunz and Midgen were officers and directors. No films were ever produced pursuant to the agreement.

In October, 1986 Adriana sued Thoeren for breaching the agreement. Thoeren filed an answer and counterclaims against Adriana Corporation. Thoeren also filed cross-claims against Zade, Kunz, Midgen and AFP. Lewis was hired to represent Adriana Corporation, Zade,

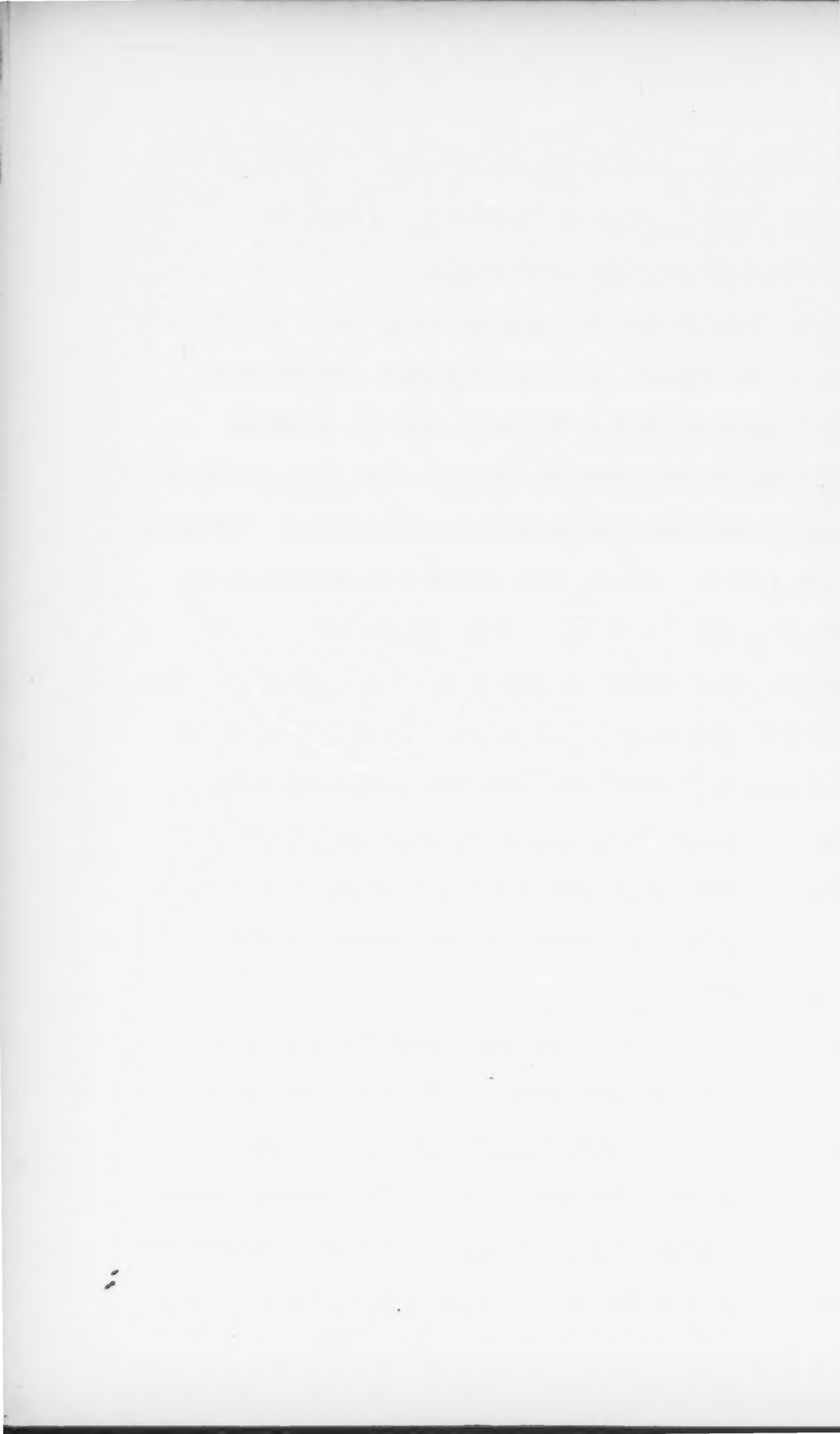


Kunz, Midgen and AFP. On December 16, Thoeren requested an initial meeting with counsel pursuant to Local Rule 6. Lewis failed to appear for the meeting.

On December 31, Thoeren served notice of a discovery request seeking depositions on February 5 and production of documents on February 2. Another copy of this request was sent to Adriana on January 30, 1987.

On February 2, 1987 Adriana failed to produce any documents as requested in the December 31 notice and sent no written response. On February 5, 1987 Lewis and his client failed to appear for the properly noticed deposition of Adriana Corporation. On February 9, Lewis served a response to Thoeren's request for production of documents listing various objections.

On February 13, Adriana sent a letter to Thoeren alleging Thoeren's attorney had a conflict of interest and refusing to produce any documents or attend discovery based on this. On February 24, Thoeren again requested



production of documents by March 2 and depositions on March 5. On March 2, Adriana refused to produce any documents.

On March 3, the district court ordered Adriana to produce all documents requested and appear for deposition. The court warned Adriana that they were getting into "deep trouble." On March 4, Adriana produced a few documents. On March 24, the court ordered monetary sanctions against Lewis and Adriana for their refusal to sign the Local Rule 6 Joint Statement. On March 16, the court denied Adriana's motion to disqualify Thoeren's counsel and sanctioned them for bringing a frivolous motion. The court also ordered a special master to preside over discovery. Adriana did not pay the court-ordered sanctions when requested by Thoeren on March 17 and 23.

On March 23, the special master ordered Adriana to disclose information regarding AFP. Adriana did not, and Thoeren was unable to serve AFP as the corporation was incorrectly identified in the pleadings. On April 30, the



special master ordered Adriana to produce documents no later than May 4 and awarded sanctions against Adriana. On May 4, Adriana again failed to produce documents. The special master found that Adriana's failure to produce documents was willful.

Adriana produced some documents on May 6, 1987. On May 19, the court found Lewis and Adriana in contempt to failure to pay the sanctions ordered on March 16 and sanctioned them an additional \$2,500.

On June 8, the special master ordered Adriana to produce documents claimed by Adriana to be privileged. On June 23, Midgen's deposition was to be taken. On that day, Adriana made an oral motion for a protective order to stop all discovery which was denied by the special master. The deposition was cancelled due to Lewis' illness and reset for June 24. The special master also ordered production of documents still not produced, and further ordered Kunz' deposition on July 7th and 8th, Zade's deposition on July 9th and 10th, and



Thoeren's deposition on July 14, 15 and 16.

On July 1, Lewis informed Thoeren that Kunz and Zade would not appear for the depositions.

No motions for protective orders were filed.

Kunz and Zade failed to appear for depositions on July 7-10. Lewis continued to refuse to produce various documents.

On November 10, the special master again ordered production of documents. The special master gave Adriana twenty days to appeal the order to the district court but Adriana did not. Adriana did not produce the documents.

On November 23, the district court ordered the deposition of Kunz and Zade for December 14.

Kunz and Zade failed to appear for depositions and no motions for protective orders were filed.

On February 16, 1988 the district court granted Thoeren's motion to dismiss Adriana Corporation's complaint, to strike Adriana's answers to the cross and counter-claims and to enter a default judgment. The court based its decision on the willful refusal of Adriana,



acting through their counsel, to proceed with discovery and to obey the orders of the court and the special master. The court entered a default judgment for \$8.5 million for Thoeren against Adriana on April 14. The court amended its judgment on April 29 to correct some clerical errors.

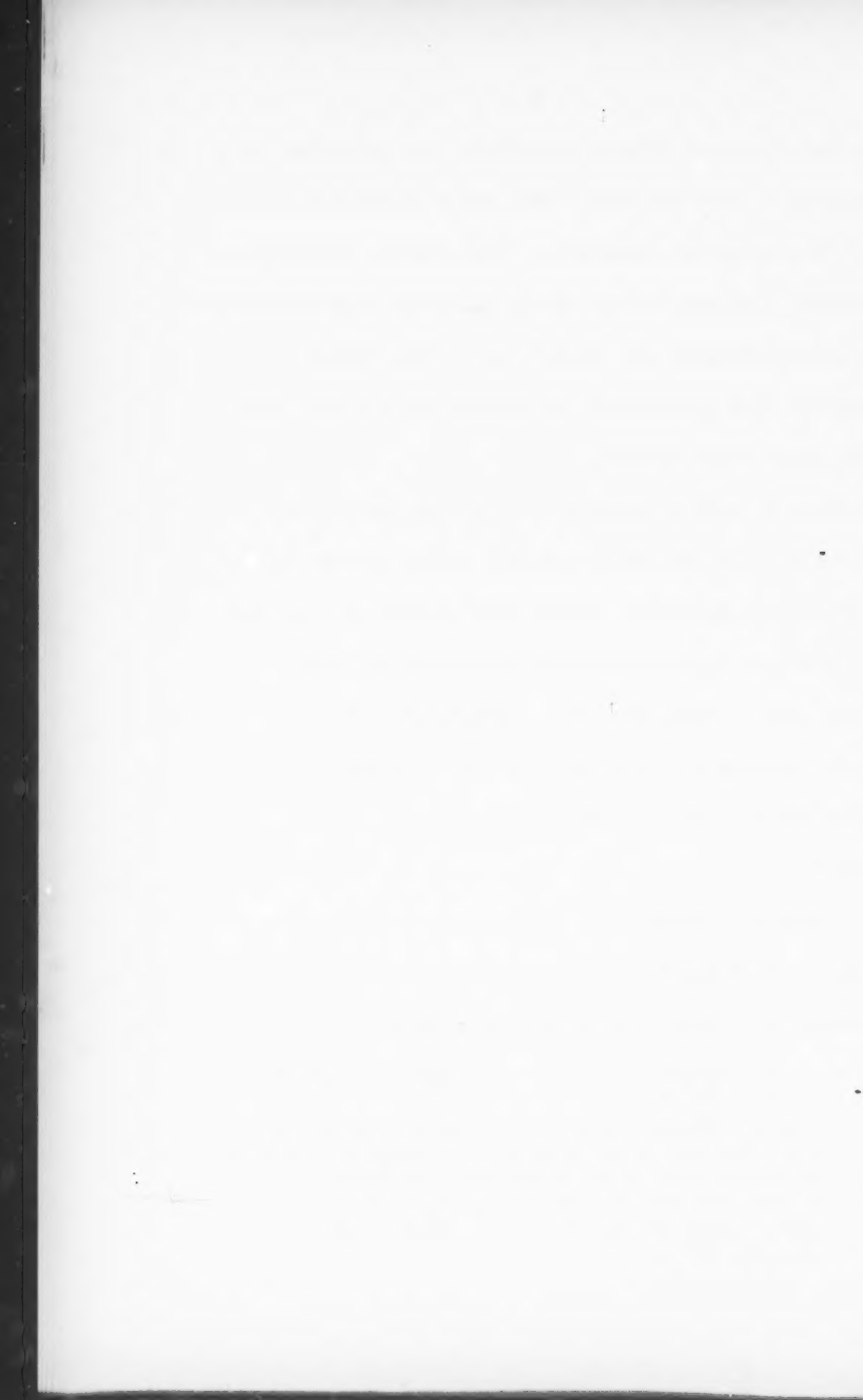
Adriana filed a motion to reconsider the judgment, which was denied. The court sanctioned Adriana under Fed.R.Civ.P. 11 for the motion to reconsider because it was frivolous. Adriana then appealed to this court, presenting a myriad of arguments in their four opening briefs.²

DISCUSSION

I. Special Master

Adriana argues that the special master's actions in imposing discovery sanctions were unconstitutional because the special master

² One of these arguments concerns a request for judicial notice of an action between Thoeren and his insurance company. This other action is not relevant to this case, and we decline to take judicial notice of it.



was performing the functions of an Article III judge. However, an objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter or the party's objection is waived. *Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984), overruled on other grounds *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir.1987).

Adriana did not object to the appointment of the special master at the time of the appointment. Adriana attended numerous meetings, depositions and hearings with the special master regarding discovery throughout March, April, May and June of 1987. Adriana finally objected to the appointment of a special master on July 6, 1987. Because the objection was not filed within a "reasonable time" of the appointment, Adriana waived its objection to the special master's appointment.

II. Rule 37 Dismissal and Default Judgment

The district court imposed the sanction of a default judgment against Adriana pursuant to Fed.R.Civ.P. 37(b) and (d) because of their numerous discovery abuses.³

³

Rule 37 provides:

(b) **Failure to comply with Order.**

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discover, ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

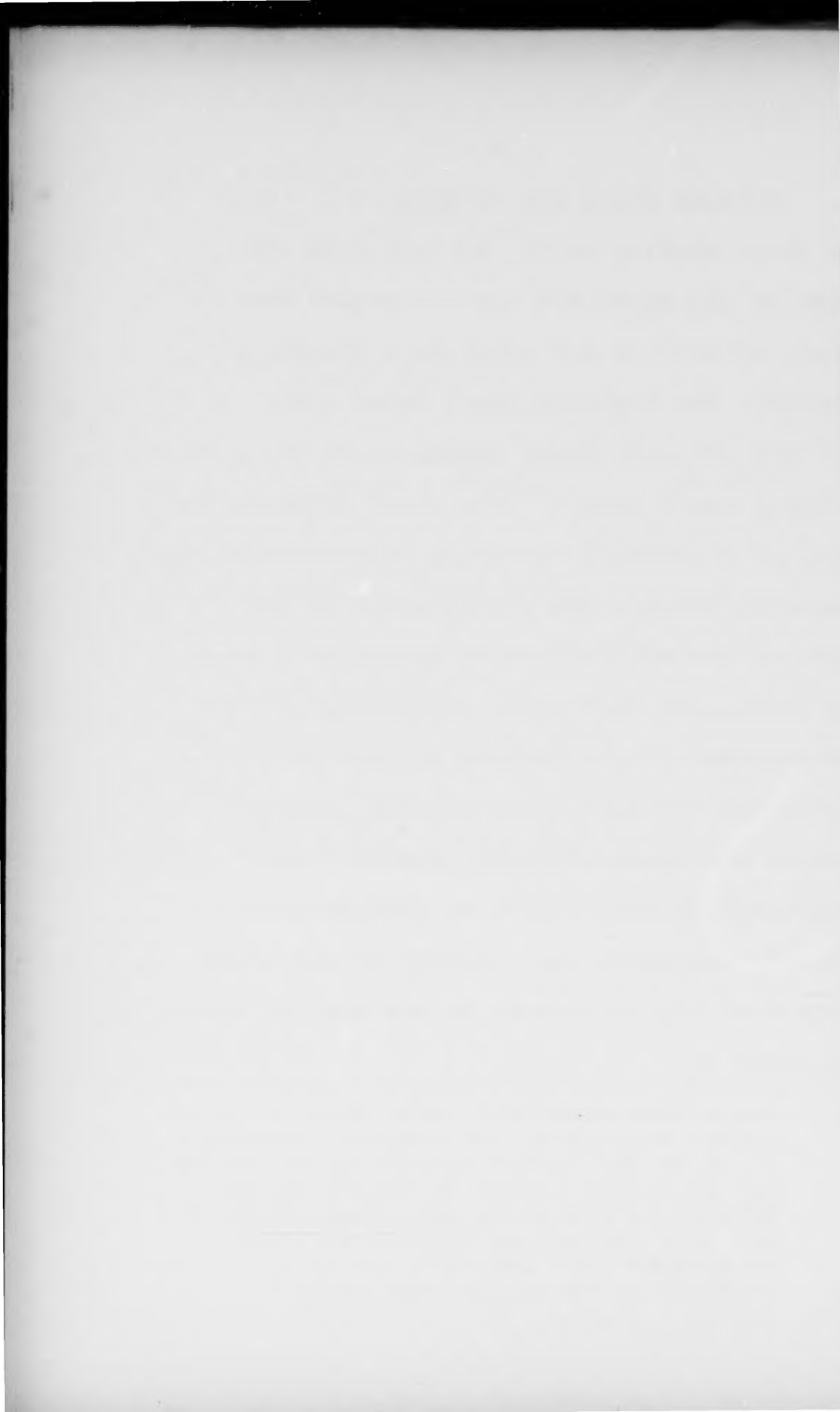
(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for

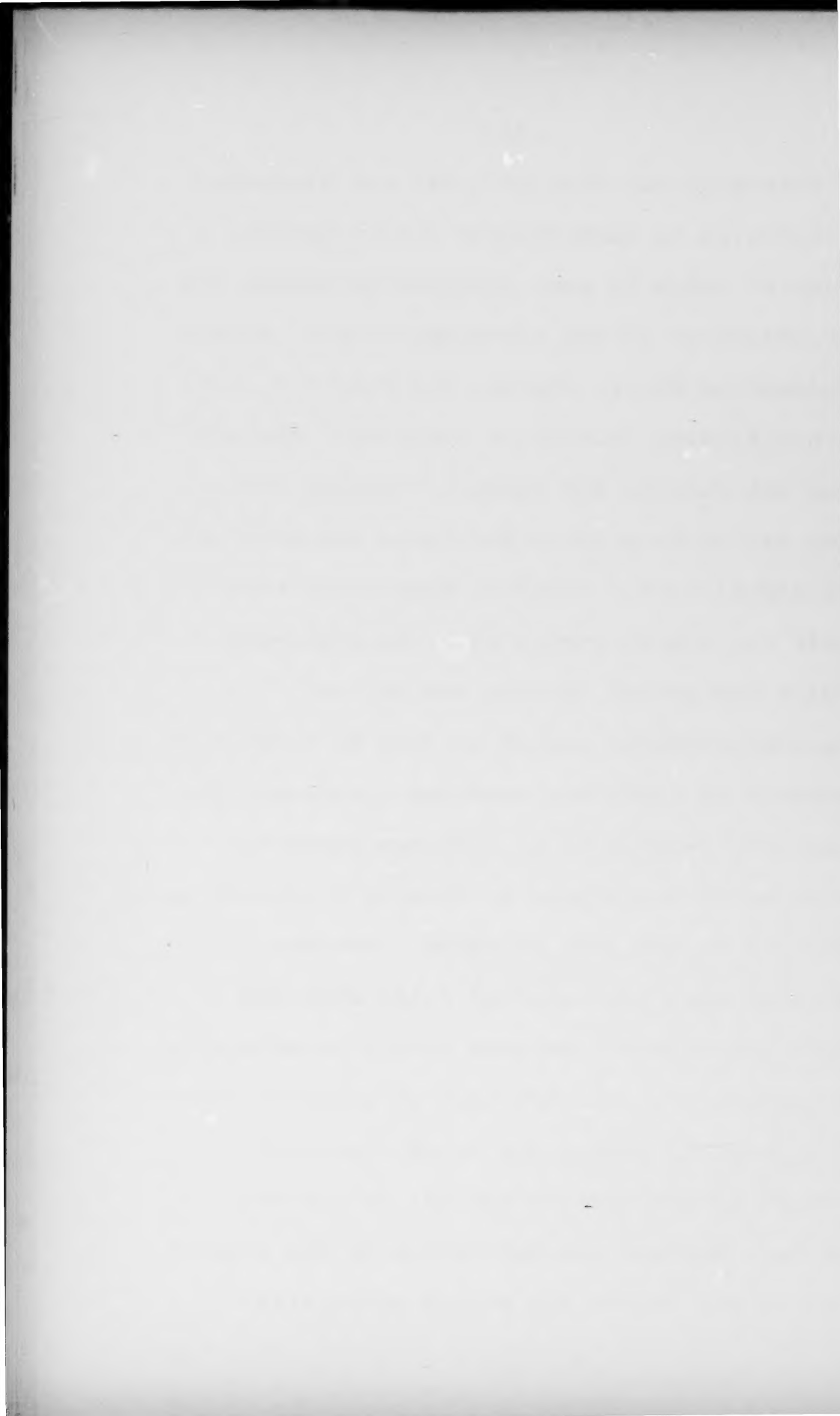
A. *Factual Basis for Default*

In their opening brief, Adriana does not dispute the facts but instead argues that their actions do not constitute discovery abuses. The district court found that Adriana, through their counsel, had violated several court orders. The court cited to the failure to produce documents as ordered by the court on March 3 and subsequently by the special master, failure to appear as ordered at deposition July 7-10, on November 23, and on December 14-16; failure to make themselves available for deposition in June, 1987 and making misrepresentations regarding the depositions; and failure to provide accurate information about the identify of the cross-defendant AFP as ordered by the special master on March 23.

inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.



"A determination that an order was disobeyed is entitled to considerable weight because a district judge is best equipped to assess the circumstances of the non-compliance." *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 379 (9th Cir.1988) (citations omitted). Adriana does not dispute the factual findings that they failed to produce documents and show up for depositions. Instead, they argue that their failure to comply with the discovery orders was proper because the initial discovery request served on them by Thoeren on December 31, 1986 was unsigned. However, the discovery request filed with the court on December 31 was signed by Thoeren's counsel as required by the federal rules. Adriana concedes that the original filed with the court was signed. Adriana offers no authority to support its argument that an unsigned copy of a properly signed and filed discovery request is ineffective and can be ignored. Further, Adriana did not object to the request when it was served but waited until after



discovery was over. Therefore, the initial discovery request was proper.

Adriana also attempts to justify its failure to comply and appear at the depositions on account of illness of both counsel and clients. However, Lewis never sought to postpone the depositions or seek a protective order from the court despite the fact that Lewis knew in advance his clients would not appear. Instead, Lewis and his clients simply failed to appear at the July, November and December scheduled depositions and now try to justify that failure.

The court also found that Adriana failed to produce documents throughout the litigation. As set out in the facts, Adriana failed to produce any of the ordered documents on several occasions and, at other times, complied only partially with production orders. Adriana again tries to excuse this behavior, basically arguing that the court's orders were in error. Adriana appealed several of the court's discovery orders to

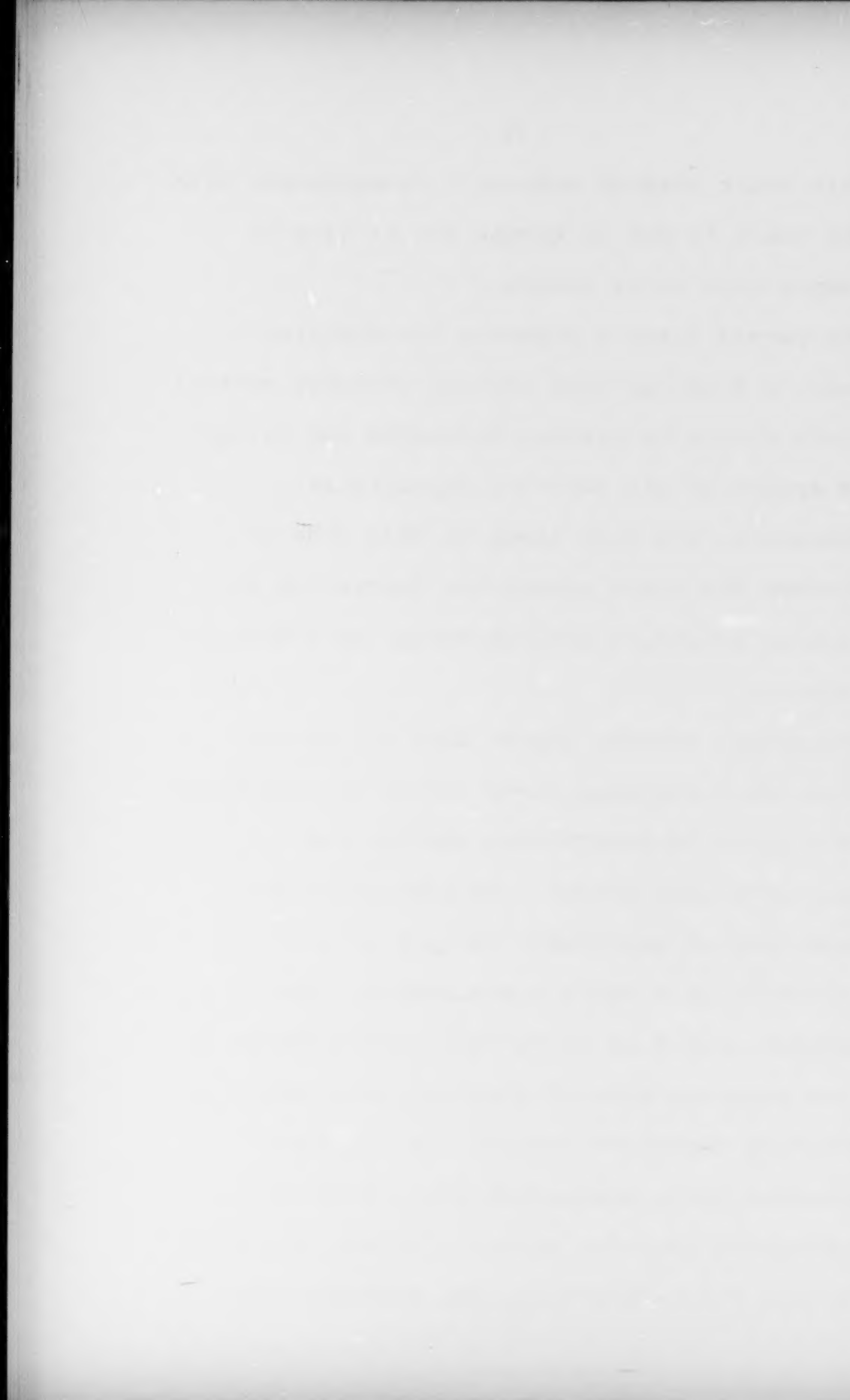


this court without success. Disagreement with the court is not an excuse for failing to comply with court orders.

The record clearly supports the district court's findings that Adriana violated several court orders to produce documents and failed to appear at six separate depositions.

Therefore, the main issue in this case is whether the court abused its discretion in finding Adriana's actions warranted a default judgment.

Initially, Adriana argues that all of the misconduct outlined above cannot be considered as a whole in determining whether the sanctions were proper. In evaluating the propriety of sanctions, we look at all incidents or a party's misconduct. See, e.g., *Kahaluu*, 857 F.2d at 601-602 (court looked to five separate acts of discovery misconduct in deciding sanctions motion). A court may consider prior misconduct when weighing a subsequent sanction motion. *Halaco*, 843 F.2d at 381, n.2. Therefore, the district court



properly considered all of Adriana's discovery conduct in deciding Thoeren's motion for default.

Adriana cites to *United States v. National Medical Enterprises, Inc.*, 792 F.2d 906 (9th Cir.1986), in support of its argument. In that case, we held that the district court erred in considering three incidents of misconduct together in ordering dismissal. However, in *National Medical Enterprises*, the third incident that precipitated the dismissal (improper communication with the judge) was in a different context than the first two (discover abuses). *Id.* at 913. Because the third incident was different in kind, the district court was not allowed to consider all three actions together for the purposes of dismissal. Here, however, all the misconduct is of the same type: discovery abuses. Therefore, *National Medical Enterprises* is inapplicable and the district court correctly considered all of Adriana's discovery conduct.



B. *Legal Basis for the Default Sanction*⁴

We have identified five factors that a district court must consider before dismissing a case or declaring a default:

(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Malone v. United States Postal Services, 833 F.2d 128, 130 (9th Cir.1987), cert. denied sub nom *Malone v. Frank*, 488 U.S. 819, 109 S.Ct.

⁴ Although this case involves only a Rule 37 default, we have held that dismissal sanctions under rule 37 and a court's inherent powers are similar. We, therefore, use cases involving dismissal under Rule 37 and inherent powers interchangeably. See *Kahaluu*, 857 F.2d at 603, n.5. Further, cases involving a dismissal of plaintiff's complaint as a sanction are comparable to those involving dismissal of a defendant's answer. *Id.* Therefore, we use both types of cases in analyzing the court's dismissal of Adriana International Corporation's complaint and Adriana's answer to the cross-claims.



59, 102 L.Ed.2d 37 (1988) (quoting *Thompson v. Housing Authority*, 782 F.2d 829, 831 (9th Cir.), cert. denied, 479 U.S. 829, 107 S.Ct. 112, 93 L.Ed.2d 60 (1986)). See also *Wanderer v. Johnston*, 910 F.2d 652, 655-56 (9th Cir. 1990).⁵ If the district court fails to make explicit findings regarding each of these factors, the appellate court must review the record independently to determine whether the dismissal was an abuse of discretion. *Malone*, 833 F.2d at 130.

Where a court order is violated, the first two factors support sanctions and the fourth factor cuts against a default. Therefore, it is the third and fifth factors that are decisive.

A defendant suffers prejudice if the

⁵ In addition, in order to warrant a sanction of dismissal, the party's violations of the court's orders must be due to willfulness or bad faith. *Wyle v. R. J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir.1983). The district court found Adriana's actions here to be willful, and Adriana does not dispute this finding.



plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case. *Id.* at 131. Delay alone has been held to be insufficient prejudice. See *Kahaluu*, 857 F.2d at 604. Failure to produce documents as ordered, however, is considered sufficient prejudice. *Securities and Exchange Comm'n v. Seaboard Corp.*, 666 F.2d 414, 417 (9th Cir.1982).

Here, the repeated failure of Adriana to appear at scheduled dispositions compounded by their continuing refusal to comply with court-ordered production of documents constitutes an interference with the rightful decision of the case. Therefore, prejudice has been established under *Malone*.

The fifth factor of the *Malone* test is violated if dismissal is imposed without first considering the impact of the sanction and the adequacy of less drastic sanctions. *Malone*, 833 F.2d at 131. This court conducts a three-part analysis when determining whether a



district court has properly considered the adequacy of less drastic sanctions: (1) did the Court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inappropriate, (2) did the court implement alternative sanctions before ordering dismissal, and (3) did the court warn the party of the possibility of dismissal before actually ordering dismissal? *Malone*, 833 F.2d at 132. In this case, the district court did not explicitly discuss the feasibility of alternative sanctions. Generally, a court must consider less alternative sanctions and discuss them before actually dismissing the case. *Kahaluu*, 857 F.2d at 604. However, in egregious cases where the court actually imposes alternative sanctions before default, such an inquiry is not necessary. *Malone*, 833 F.2d at 132.

Here, the court imposed the following sanctions prior to dismissal: monetary sanctions for filing a frivolous motion, for



failure to comply with Local Rule 6, for failure to produce documents, and for failure to pay earlier sanctions. Additionally, the court also found Lewis in contempt for failing to pay the sanctions. Adriana continually disobeyed court orders and acted in willful disruption of the discovery process. Adriana had not complied with past sanctions, and the court had no reason to believe they would in the future. Therefore, the court satisfied the consideration of alternatives requirement here by imposing various other sanctions before dismissal. See *id.*

As set out above, the district court did impose alternative sanctions before dismissing the case, thus satisfying the second prong of the test to determine whether a district court has imposed alternatives to dismissal.

The last part of the test looks to whether the district court warned of the possibility of dismissal. *Malone*, 833 F.2d at 132. Adriana claims that, in order for a warning to be adequate under *Malone*, the warning must



identify the specific conduct which will trigger the sanction and must identify the specific sanction the court is contemplating. In this case, the court did identify the specific conduct by the plaintiffs that would trigger the sanction. The court stated that if Zade and Kunz failed to appear for the scheduled deposition in December of 1987, "the complaint will be dismissed." This satisfies the requirement that the court identify the party's action that will lead to the sanction. See *In re Rubin*, 769 F.2d 611, 618 n.7 (9th Cir. 1985).

Adriana also argues that the district court was required to give notice of the specific sanction it was contemplating. Here, the judge warned only of a dismissal, not a default. We have held that an explicit warning is not always necessary. *Kahaluu*, 857 F.2d at 605. See *Malone*, 833 F.2d at 133 (no explicit warning necessary where harsh sanction of dismissal should not have



surprised plaintiff who willfully violated court's order).

As in *Malone*, Adriana should not have been surprised that Zade's and Kunz' repeated failure to appear for a deposition would result not only in the dismissal of Adriana's complaint but also in the entry of a default judgment in the case to which Zade and Kunz were parties. Further, Adriana was warned twice by the judge that their discovery conduct was improper. Finally, the court's order on October 28, 1986 warned that a failure to comply with the local rules may result in dismissal. In light of these various warnings, the court provided sufficient notice under *Malone*.

The five-part test announced in *Malone* is viewed as a balancing test. See, e.g., *Kahaluu*, 857 F.2d at 603. In this case, the first three factors weigh in favor of sanctions, dismissal and default. See *Wanderer*, at 656. The fifth factor, consideration of alternatives, also weighs in

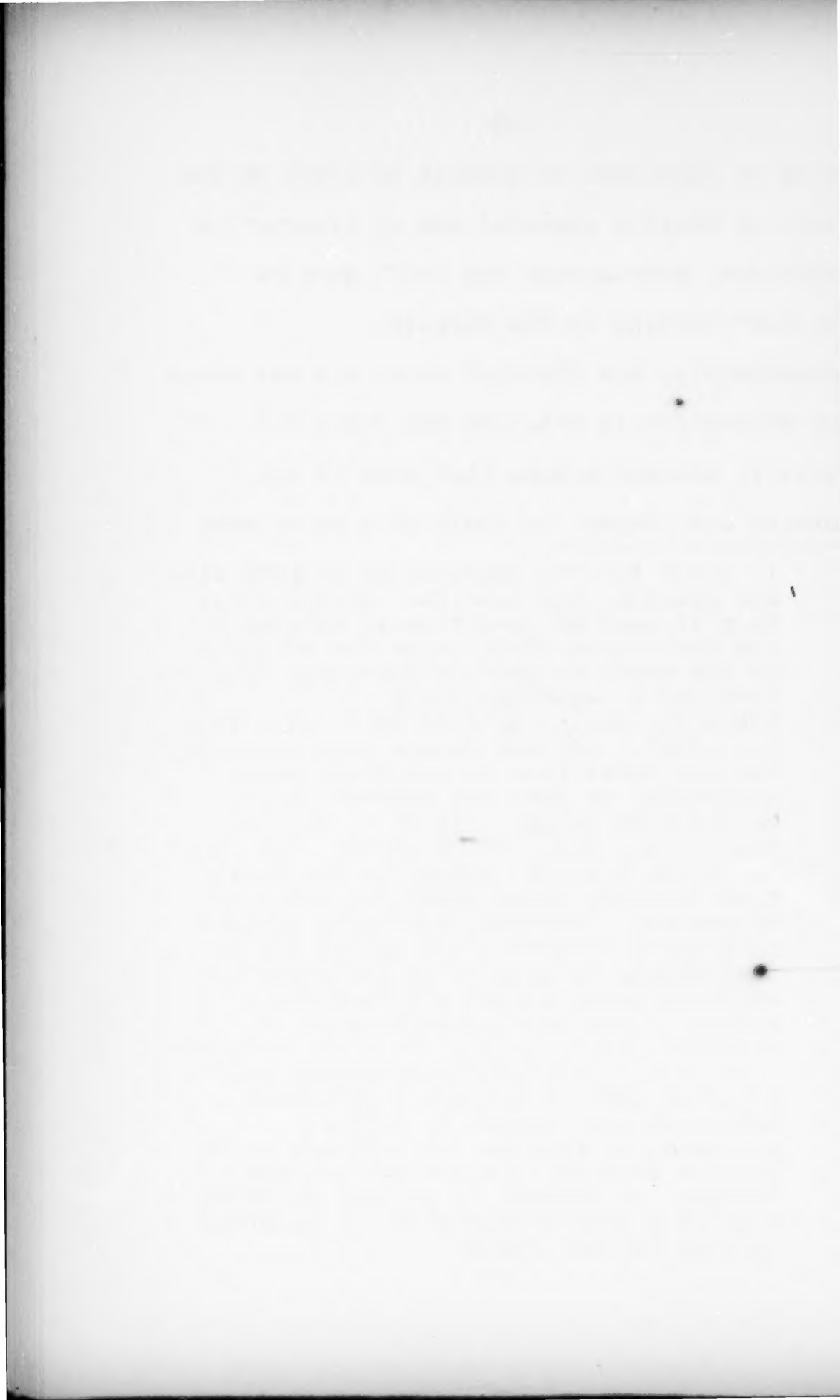
favor of dismissal or default in light of the district court's repeated use of alternative sanctions, even though the court gave no explicit warning of the default.

Consequently, the district court did not abuse its discretion in entering the default.⁶

Finally, Adriana argues that even if the default was proper, it could only be entered

⁶ In order for the sanction to comport with due process, the sanction imposed under Rule 37 must be specifically related to the particular claim which was at issue in the order to provide discover.

Fjelstad v. American Honda Motor Co. Inc., 762 F.2d 1334, 1342 (9th Cir.1985). Adriana raises this argument for the first time in its reply brief. Therefore, we need not address the relatedness issue. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir.1986) (issues raised for the first time in reply brief generally not addressed). However, Adriana's failure to produce documents and appear for depositions is related to the court's striking their answer and entering a default. See *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909) (striking answer and entering default against a corporate defendant who refused to produce documents or permits its officers to be deposed does not violate due process because its refusal to produce evidence created a presumption that its asserted defense was meritless).



against those individuals who themselves engaged in misconduct. Even assuming Adriana's theory is correct, Zade, Kunz and Midgen "participated" in misconduct in this case through their involvement with Adriana Corporation. Zade and Kunz failed to appear at depositions in July and December.

Adriana Corp. failed to produce documents throughout the litigation. Further, Lewis failed to comply with Local Rule 6 in this case as well as various court orders to compel discovery relating to the cross-claims against Midgen, Zade, Kunz and Adriana Corp. Lewis' misconduct can be imputed to all his clients. See *Hamilton Copper & Steel Corp. v. Primary Steel, Inc.*, 898 F.2d 1428, 1431, n. 2 (9th Cir.1990). Adriana's argument that misconduct by one party cannot be grounds for sanctioning an "innocent" party fails because none of the parties in the case are "innocent".

III. Damages

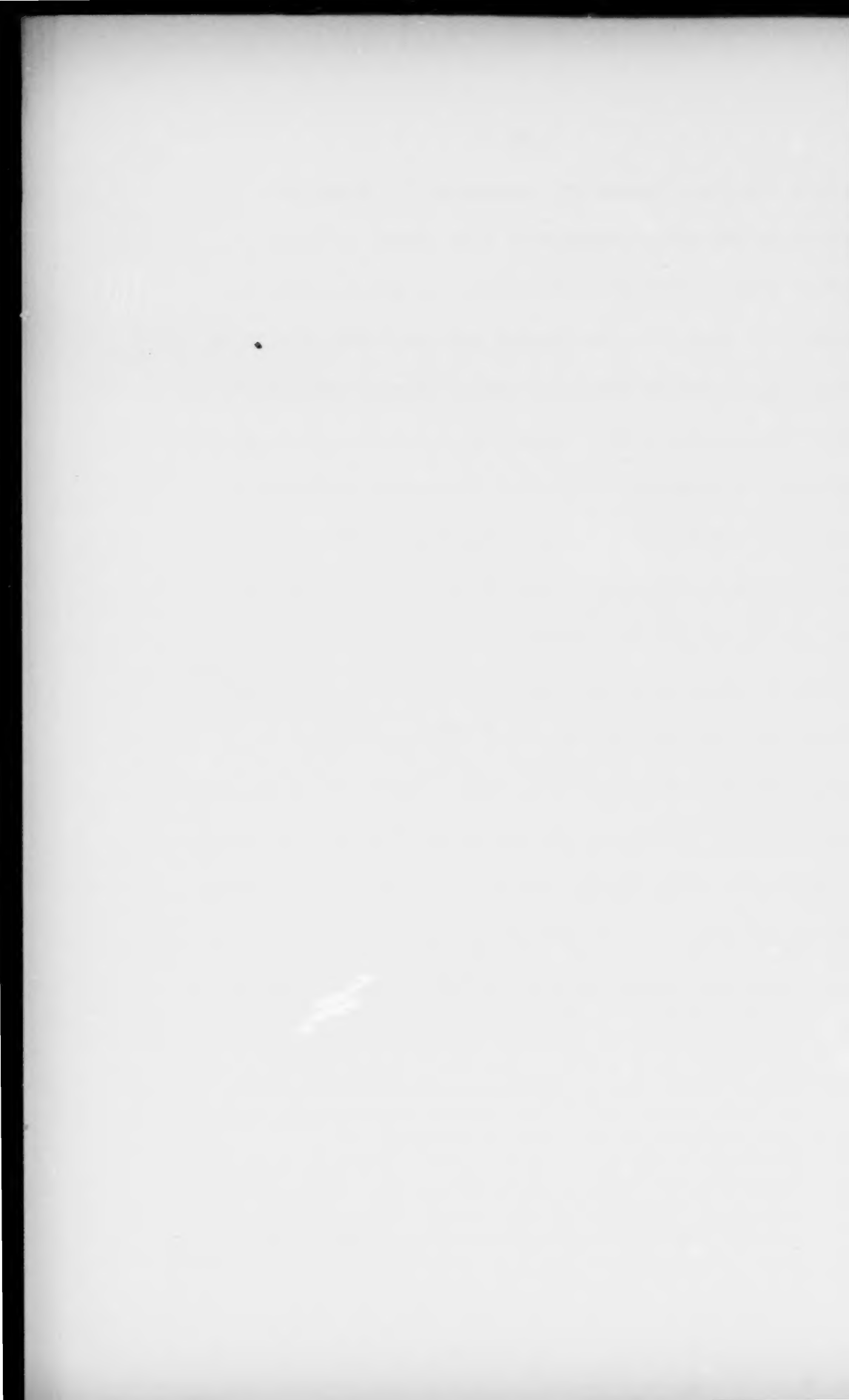
Adriana contends it was entitled to a jury

trial on the issue of damages.⁷ However, after a default judgment has been entered under Fed.R.Civ.P. 37(b)(2), a party has no right to jury trial under either Fed.R.Civ.P. 55(b)(2), which authorizes a district court to hold an evidentiary hearing to determine the amount of damages, or the Seventh Amendment. *Henry v. Sneiders*, 490 F.2d 315, 318 (9th Cir.), cert. denied, 419 U.S. 832, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974).

Adriana also argues that the district court erred in not entering findings of fact pursuant to Fed.R.Civ.P. 52. Rule 52 requires findings of fact to be entered "in all actions tried upon the facts without a jury or with an advisory jury...." However, a default

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Adriana also contends that the district court did not have jurisdiction to award damages based on Thoeren's cross-claims. Thoeren's claims included a federal copyright infringement claim under 17 U.S.C. Sec. 501, et seq., which conferred jurisdiction on the district court pursuant to 28 U.S.C. Sec. 1331. Therefore, the court properly exercised pendent jurisdiction over Thoeren's other state law claims under 28 U.S.C. Sec. 1441(c).



judgment generally precludes a trial of the facts except as to damages. *Brown v. Kenron Aluminum & Glass Corp.*, 477 F.2d 526, 531 (8th Cir. 1973). Therefore, Rule 52 is

inapplicable except as to damages. *Id.*

Consequently, the trial judge's failure to issue findings of fact regarding Adriana's liability was not in error. See *id.*

Adriana next argues that the district court erred in excluding several pieces of evidence during the damages hearing. We find no abuse of discretion in the trial judge's rulings.

The evidence excluded related to the liability of Adriana, an issue that became irrelevant once the default judgment was entered. See *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir.1977) (general rule is that upon default, allegations of complaint are accepted as true except as to damages).

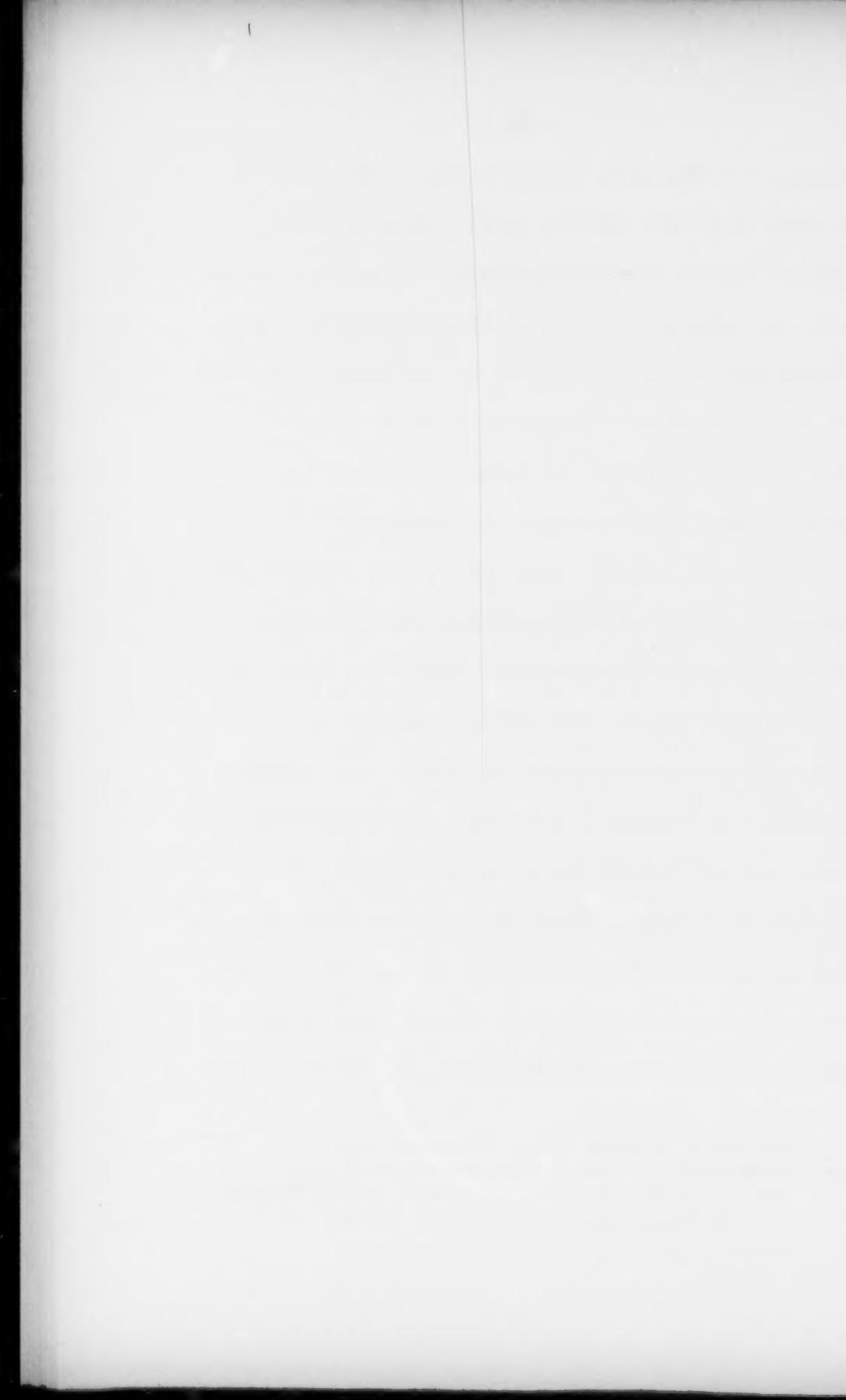
Lastly, Adriana seems to contend that there was insufficient evidence to support the award of damages in this case. Adriana's basic argument is that the judge improperly awarded



damages to Thoeren because the liability of Adriana was not sufficiently established. Adriana again misunderstands the effect of a default judgment. The default conclusively establishes the liability of Adriana. *Geddes*, 449 F.2d at 560. Therefore, there was sufficient evidence to support the trial court's award of damages to Thoeren.⁸

Adriana also argues that the court erred in awarding punitive damages against Adriana International Corporation, Zade and Kunz because the court prevented them from presenting any evidence of their net worth. However, the record does not show any offer of proof of net worth to be admitted at the default hearing. Because neither Adriana Corp., Zade or Kunz offered to put their net worth into evidence, they cannot now complain that the district court erred in refusing to

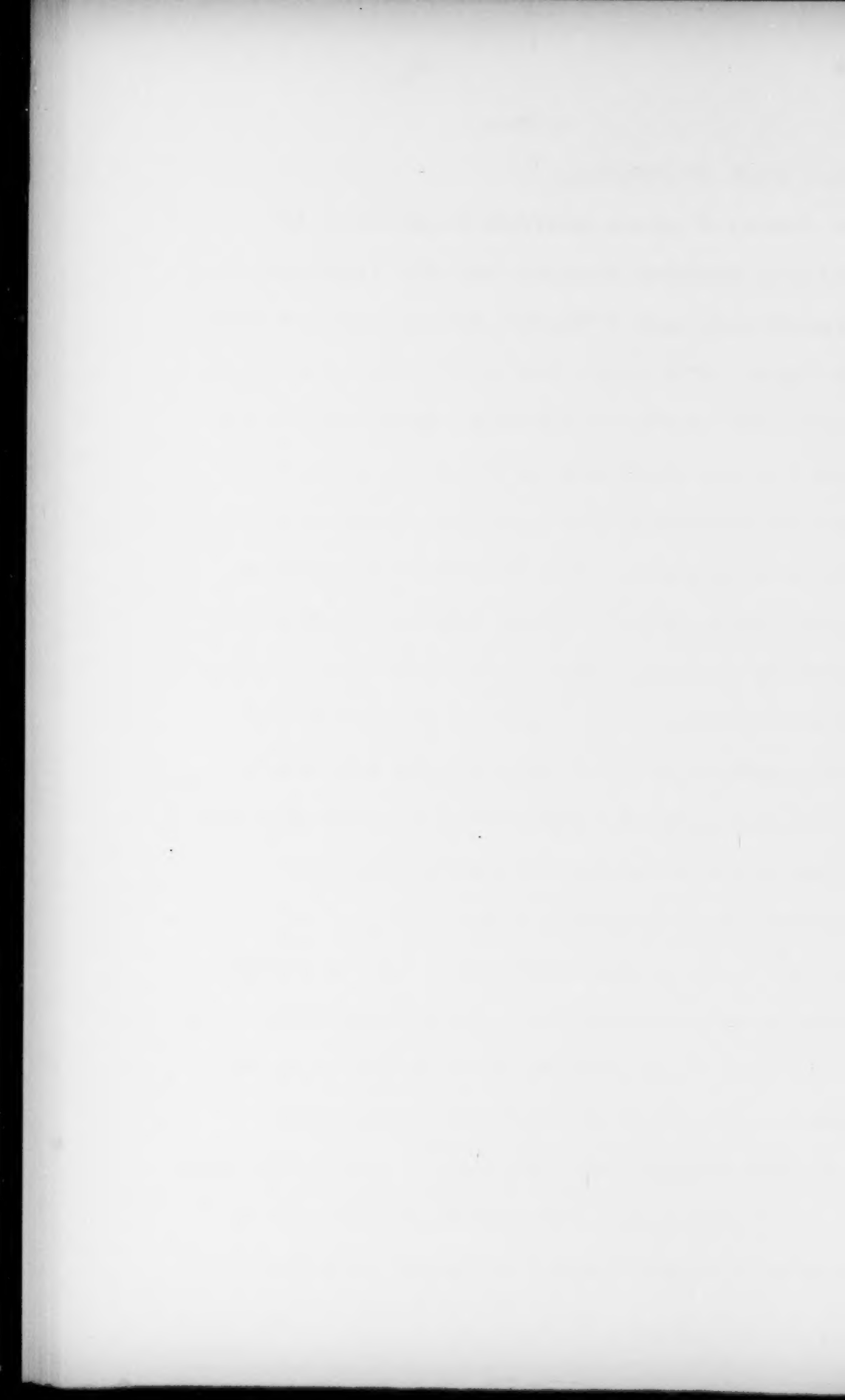
⁸ Adriana argues that Thoeren was improperly awarded damages for his defamation claim. However, no damages for defamation were given by the trial court.



admit such evidence.

The district court awarded \$1 million in punitive damages against Adriana International Corporation, and \$750,000 apiece against Zade and Kunz. The court had sufficient evidence of the net worth of Adriana, Zade and Kunz from the declarations of Thoeren, Zade and Kunz to determine the appropriate amount of punitive damages. See *Professional Seminar consultants, Inc. v. Sino American Technology Exchange Council, Inc.*, 727 F.2d 1470, 1473 (9th Cir.1984). In light of the amount of compensatory damages awarded and Adriana's egregious conduct, the district court did not abuse its discretion in fixing punitive damages at this level. *Id.*

Adriana also argues that emotional distress damages are not available as a damage for fraud; and were awarded to Thoeren in error. Thoeren was awarded \$200,000 in emotional distress damages against Zade, Kunz and Midgen on his third claim for relief for fraud. Thoeren's third claim for relief alleged that



Zade, Kunz and Midgen entered into the contract without any intention to perform the agreement. This cause of action of fraud is governed by Cal.Civ.Code Sec. 3343. This statute allows recovery for ordinary consequential damages and does not authorize an award of damages for emotional distress. *O'Neil v. Spillane*, 45 Cal.App.3d, 147, 159, 119 Cal.Rptr. 245 (1975). Thus, the award of \$200,000 to Thoeren for emotional distress was improper.⁹

IV. Monetary Sanctions

Prior to the dismissal, the district court sanctioned Lewis for filing frivolous motions

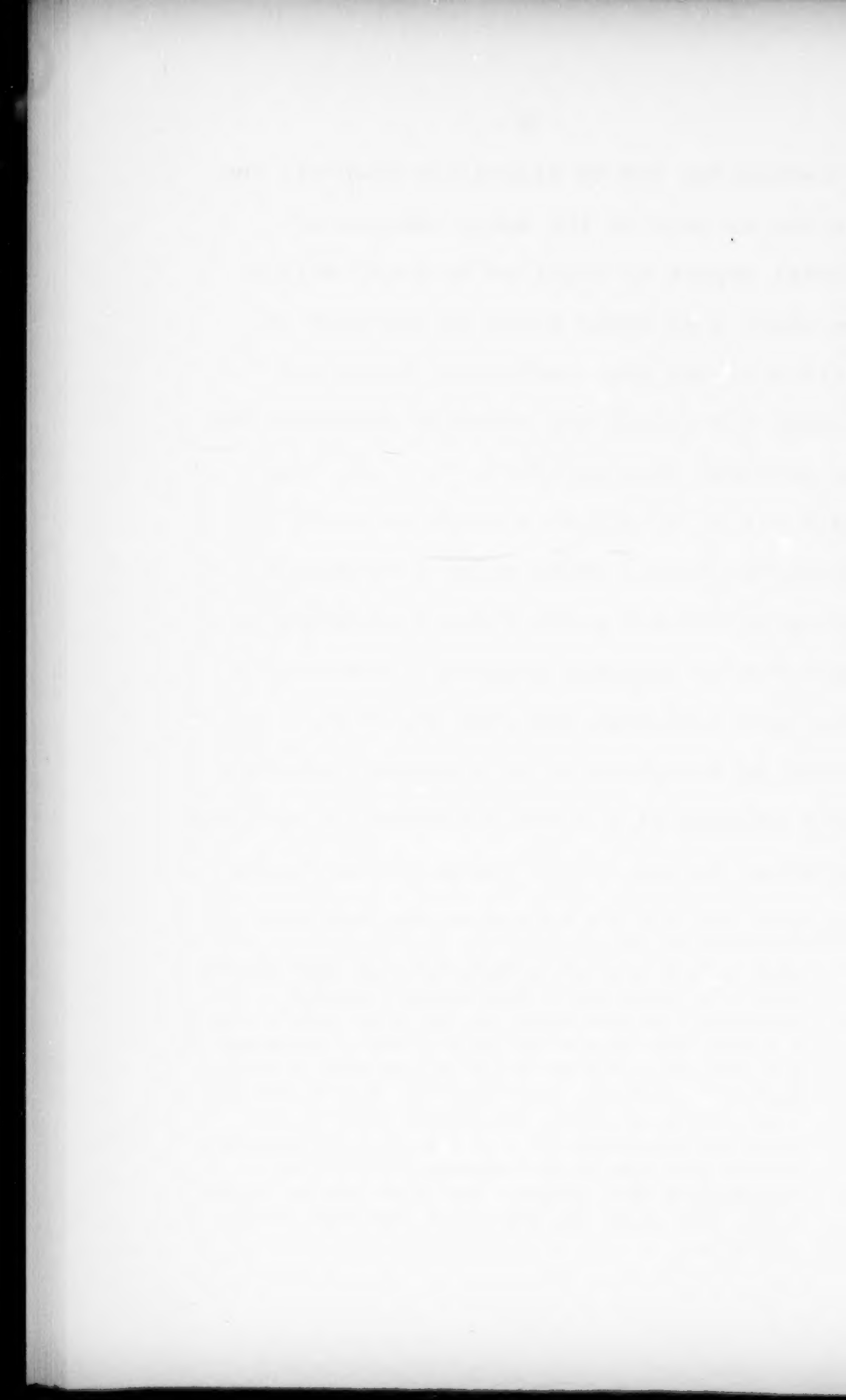
⁹ Adriana also contends that the district court's use of findings prepared by Thoeren's counsel invalidates the court's orders. However, although the practice of a prevailing party preparing findings is discouraged in this circuit, it is not objectionable as long as the findings are supported by the record. *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir.), cert. denied, 488 U.S. 948, 109 S.Ct. 378, 102 L.Ed.2d 367 (1988). Because the findings are supported by the record in this case, the fact that Thoeren prepared the court's findings is of no consequence.



to reconsider and to disqualify counsel, and failing to join in the early meeting of counsel report as required by Local Rule 6. The court also found Lewis in contempt for failing to pay the sanctions. Lewis and Adriana now appeal the award of sanctions and the contempt finding.¹⁰

Fed.R.Civ.P. 11 allows a court to award sanctions where a party makes a frivolous filing or where a party files a pleading or paper for an improper purpose. *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir.1987). A filing is frivolous if no competent attorney would believe it was well-grounded in fact and warranted by law. *Id.* Lewis was sanctioned for both the motion to reconsider and the

¹⁰ The sanctions were awarded against Lewis and his clients. Therefore, Lewis remains in the case as an intervenor to appeal the grant of sanctions. Because plaintiffs can be held accountable for Lewis' conduct, see *Malone*, 833 F.2d at 134, this section analyzes the appropriateness of the sanctions against Lewis and Adriana together. If the sanctions are proper against Lewis, then they can also be enforced against his clients.



motion to disqualify counsel because the district court found them to be frivolous.¹¹ We review all aspects of a district court's Rule 11 determination for abuse of discretion. *Cooter & Gell*, 110 S.Ct. at 2461.

Lewis argues the sanctions were improper because Judge Real should have been disqualified because of his ex parte communications with the special master. However, this argument was not presented in their opening brief. Therefore, we do not

¹¹ Lewis raises several arguments in his reply brief, including the constitutionality of the special master's appointment. However, Lewis' brief was to address only those issues relating to the Rule 11 sanctions imposed against him. The special master imposed none of the monetary sanctions at issue on appeal. Thus, Lewis' arguments regarding the special master are irrelevant.

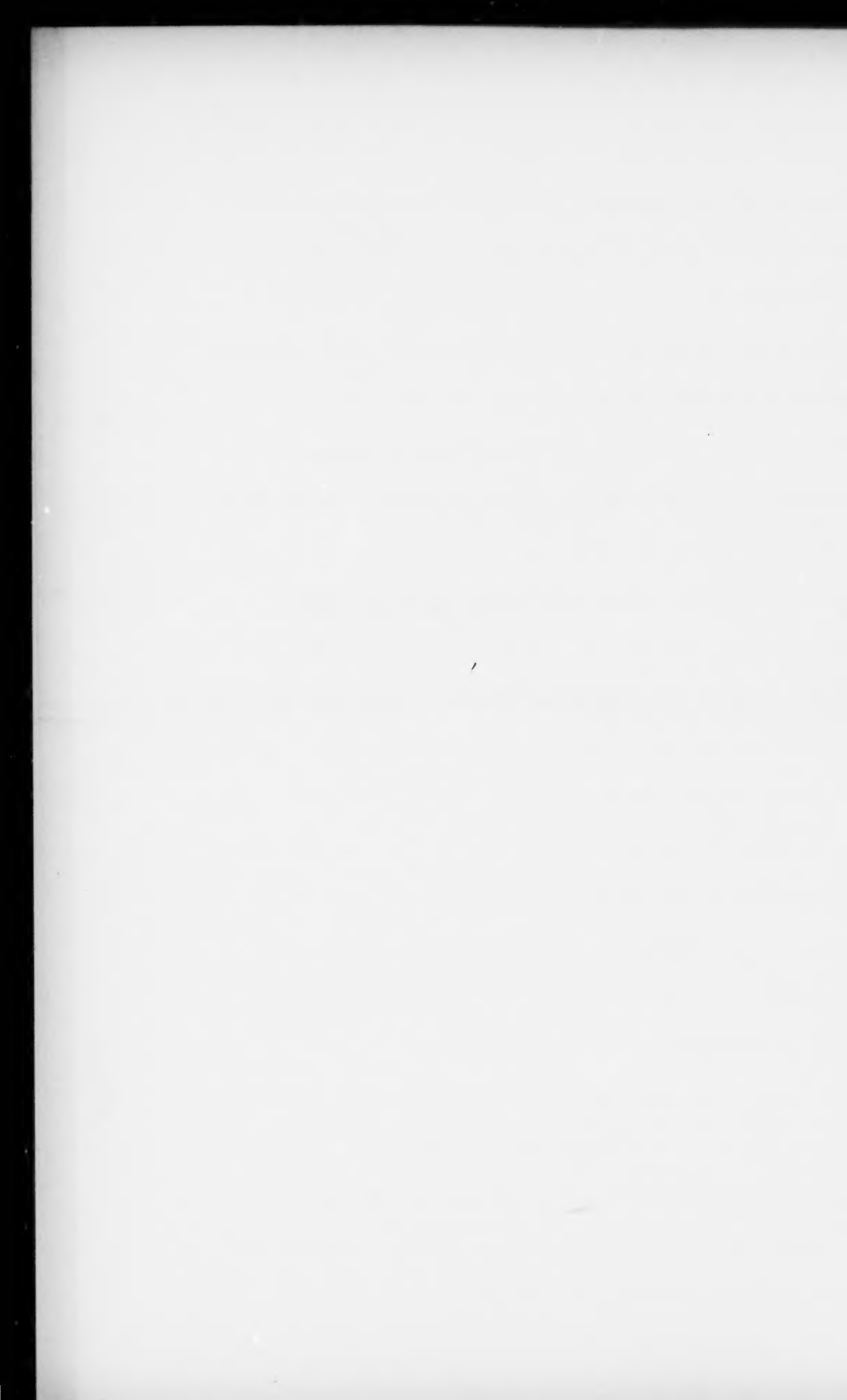
Lewis' other arguments regarding the default judgment, the *Kordich* case, the motion for substitution, the performance by Adriana's new counsel, and personal jurisdiction over AFP are all outside the scope of Lewis' reply brief, which was limited to issues regarding the monetary sanctions imposed against Lewis. Therefore, we do not address the merits of his contentions.



address it on appeal. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir.1986).

Lewis also argues that Judge Real should have been disqualified pursuant to 28 U.S.C. Sec. 455(a) because of an alleged financial interest in the case. The Supreme Court has said that Sec. 455(a) is violated if a judge is not recused when a reasonable person, knowing the relevant facts, would expect that a judge knew of circumstances creating an appearance of partiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61, 108 S.Ct. 2194, 2202-03, 100 L.Ed.2d 855 (1988) (quoting *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir.1986)).

Lewis presents no facts that create an appearance of partiality in this case. Lewis argues that Judge Real was biased because of a financially beneficial relationship between the special master and Judge Real. However, Lewis offers no objective proof of this



relationship. The district court correctly denied this motion to disqualify Judge Real. Therefore, it did not violate Sec. 455(a) for Judge Real to remain on this case.

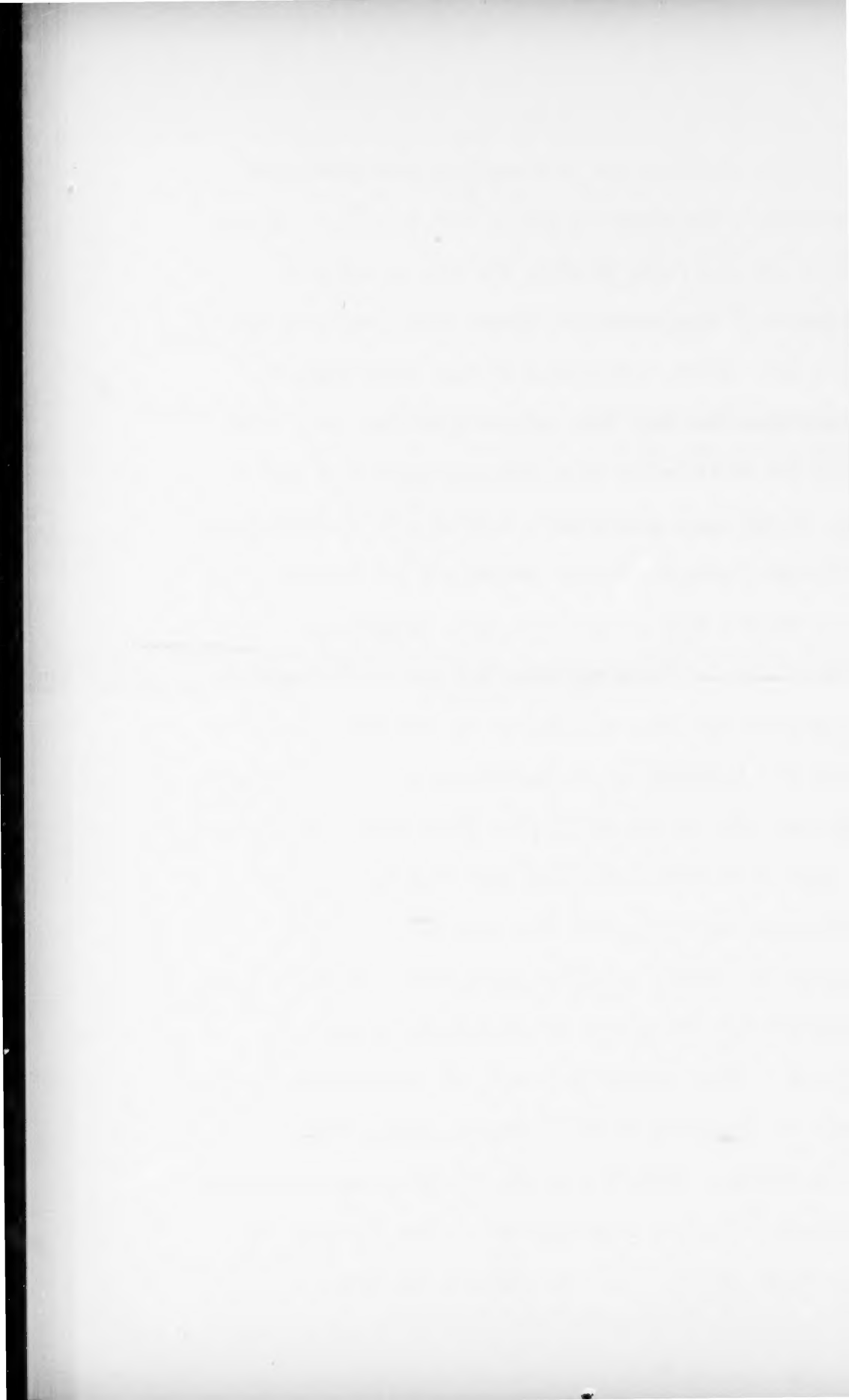
Consequently, Judge Real had authority to issue discovery orders in this case.

The district court also imposed sanctions for Lewis' motion to disqualify Thoeren's attorney. The essence of Lewis' motion to disqualify Thoeren's attorney was that Thoeren's attorney had a conflict of interest because he had represented Adriana as well. However, Lewis offered no facts showing an attorney-client relationship except that Thoeren's attorney attended a meeting of Adriana two weeks after Thoeren resigned from Adriana and sent a settlement letter to Adriana. This evidence does not show that Thoeren's attorney ever represented Adriana. Therefore, the district court did not abuse its discretion in imposing sanctions for the motion to disqualify.

Lewis was also sanctioned for bringing a



frivolous motion to reconsider the amended judgment. Thoeren filed a Fed.R.Civ.P. 60(a) motion to correct errors in the original judgment. The amended order was entered on April 29, 1988. Adriana filed a motion to reconsider on May 13, after the ten day time limit to file such motions established by Rule 59(e) had expired. Adriana's substantive position raised no new evidence or issues of law. Thus, the court did not abuse its discretion in finding the motion frivolous. The amount of the sanction is reviewed for an abuse of discretion. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 238 (9th Cir.1986). The judge awarded \$2,300 for the motion to reconsider and \$4,955 for the motion to disqualify based on the attorney's fees incurred by Thoeren in opposing these motions. The court's award of sanctions, based on Thoeren's attorney's fees, was appropriate. Fed.R.Civ.P. 11 ("an appropriate sanction ... may include an order to pay to the other party ... the amount of the



reasonable expenses incurred because of the filing of the (abusive) pleading ... including a reasonable attorney's fee.")

Lewis was also sanctioned \$990 for violating Local Rule 6, which requires counsel to meet early in the litigation. As the chronology indicates, Lewis failed to comply with this rule by not showing up at the scheduled meetings and failing to sign the Local Rule 6 statement. Lewis does not dispute that the court had the authority to enter this sanction under the local rules; rather, he argues that he did not violate the rule.¹² However, the district judge's conclusion that Lewis did violate the rule is supported by the record and, thus, the sanction was not an abuse of discretion.

¹² In the reply brief, Lewis argues that the sanctions for the local rule violations were improper because no bad faith was shown and the sanction was excessive. However, we do not address this argument because it was raised for the first time in the reply brief. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir.1986) (issues raised for first time in reply brief will not be addressed).



The court also found Lewis in contempt for failure to obey the court's orders of March 16 and 24 to pay sanctions to Thoeren. Lewis clearly violated the court's orders by refusing to pay the sanctions. The contempt citation was proper.

V. Additional Sanctions

Thoeren seeks attorney's fees and any other relief this court deems appropriate. Under Fed.R.App.P. 38 this court has discretion to award attorney's fees and single or double costs as a sanction for bringing a frivolous appeal. An appeal is considered frivolous if the result is obvious or the appellant's arguments are wholly without merit. *Glanzman v. Uniroyal, Inc.*, 892 F.2d 58, 61 (9th Cir.1989).

The opening briefs in this case are frivolous. The arguments raised by Lewis are rehashings of the facts and present hardly any legal analysis. Because the new attorneys for Adriana substantially improve the arguments in the reply brief, we award attorney's fees and



double costs against appellants and Lewis only, and not Adriana's new counsel.

Further, the opening briefs all use one-and-one half line spacing as opposed to the double spacing required by Fed.R.App.P.Rule 32(a).

28 U.S.C. Sec. 1927 authorizes sanctions for an attorney's failure to comply with our rules governing the form of briefs. See *Hamblen v. County of Los Angeles*, 803 F.2d 462, 464-65 (9th Cir.1986). Therefore, Lewis and Adriana are sanctioned for their failure to comply with Fed.R.App.P. 32(a). A separate order will be filed regarding the determination of the amount of the sanctions on appeal.

CONCLUSION

The district court's entry of default was a proper sanction for the outrageous behavior of Adriana in this case. The monetary sanctions were similarly proper. The award of damages is also affirmed except as to the \$200,000 awarded by Thoeren as emotional distress damages for the fraud claim which is reversed. We affirm in part, reverse in part and remand



for the entry of a new judgment that does not include damages for emotional distress.

AFFIRMED IN PART, REVERSED IN PART AND

REMANDED.



APPENDIX II

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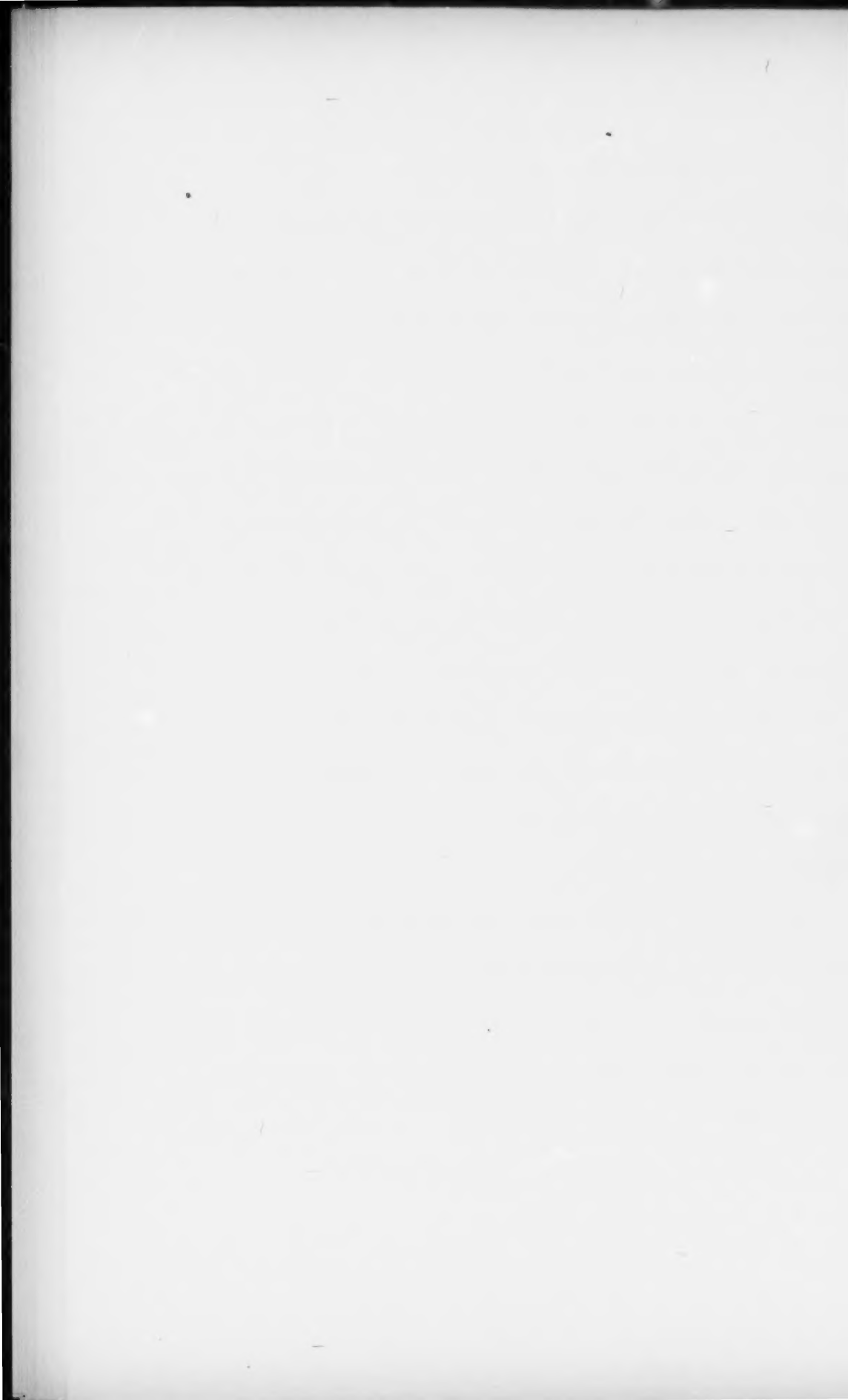
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL)	Case No.
CORPORATION,	)	CV-86-6775-R
a California)	
corporation,	)	ORDER
)	
Plaintiff)	
)	
vs.)	
)	
KONSTANTIN THOEREN,)	
PATROLA FILMS, INC.)	
a California)	
corporation, and	)	Date:
PATROLA, G.M.B.H.,	)	March 16, 1987
a Federal Republic	)	Time: 10:00 a.m.
of Germany corporation	)	Courtroom: 8
)	
Defendants.)	
)	
)	
AND RELATED CROSS-ACTION)	
)	

Plaintiff's Motion for Disqualification and Defendants' Request for Sanctions Against Plaintiff and Plaintiff's Counsel (In Conjunction With Order To Show Cause Re Dismissal and Plaintiff's Motion For Disqualification) came on regularly for hearing on March 16, 1987, before Chief District Judge Manuel L. Real in Courtroom 8 of the above-entitled Court. Michael K. Zweig of Sacks & Zweig appeared on behalf of Defendants Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. F. Burke Lewis and Amy Cassedy of Lewis & Company appeared on behalf of Plaintiff Adriana International Corp.

THE COURT, having considered the pleadings and evidence submitted in support of and in opposition to the Motions, and upon hearing argument of counsel thereon, ORDERED AS FOLLOWS:

1. Plaintiff's Motion for Disqualification is denied.

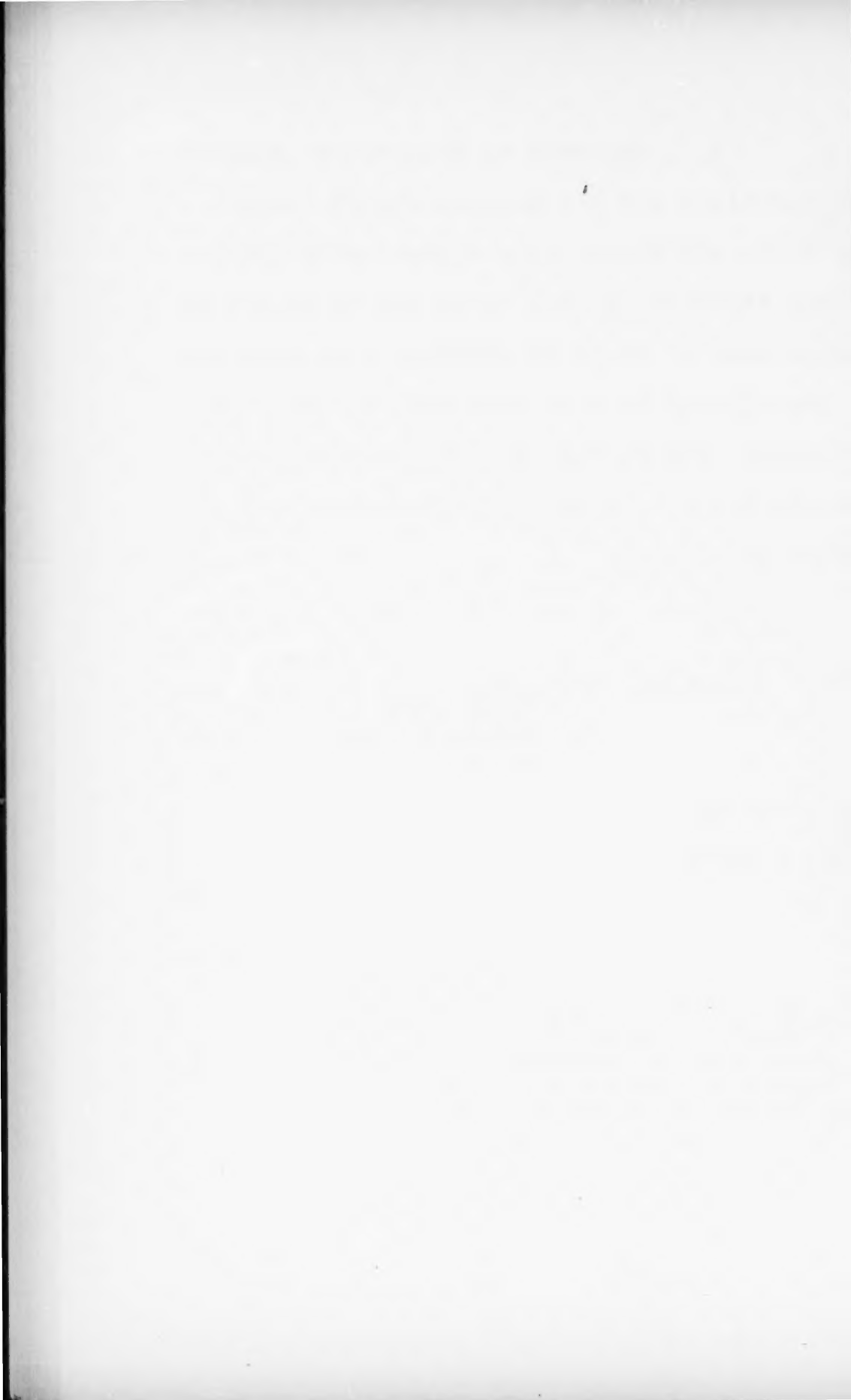


2. Pursuant to Defendants' Request for Sanctions and the grounds stated therein, Plaintiff and Plaintiff's counsel were ordered to pay sanctions in the total sum of \$4,955.00 (based upon 27 hours of attorney time expended at the rate of \$165 an hour and ten hours of paralegal time at the rate of \$50 an hour), due and payable to Defendants' Counsel forthwith.

Dated: March 31, 1987 /s/
Chief Judge
Manuel L. Real

Submitted by:
SACKS & ZWEIG

By /s/
Michael K. Zweig
Attorneys for Defendants,
Counter-Claimants and Cross-
Claimants Konstantin Thoeren,
Patrola Films, Inc. and Patrola,
G.M.B.H.



APPENDIX III

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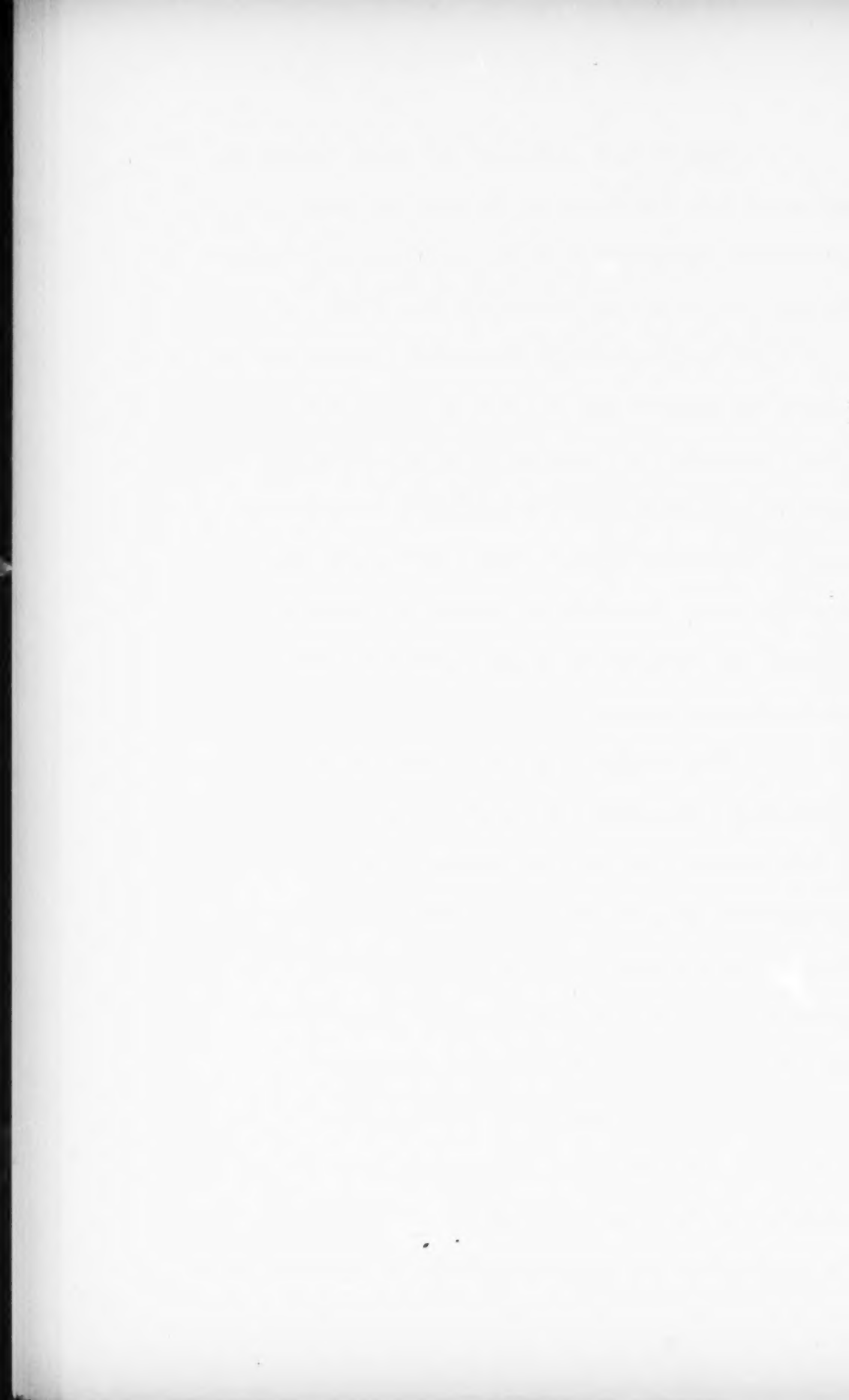
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL)	Case No.
CORPORATION,	)	CV-86-6775-R
a California)	
corporation,	)	ORDER
)	
Plaintiff)	
)	
vs.)	
)	
KONSTANTIN THOEREN,)	
PATROLA FILMS, INC.)	
a California)	
corporation, and	)	Date:
PATROLA, G.M.B.H.,	)	March 24, 1987
a Federal Republic	)	Time: 10:00 a.m.
of Germany corporation	)	Courtroom: 6
)	
Defendants.)	
)	
AND RELATED CROSS-ACTION)	
)	

The Court's ~~was~~ To Show Cause Re Dismissal For Failure to Prosecute and Defendants' Request for Additional Sanctions came on for hearing on March 24, 1987, at 10:00 a.m. before Chief District Judge Manuel L. Real in Courtroom 6 of the above-entitled Court. Michael K. Zweig of Sacks & Zweig appeared on behalf of Defendants Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. Amy Cassedy of Lewis & Company appeared on behalf of Plaintiff Adriana International Corp.

THE COURT, having considered Defendants' Request For Additional Sanctions and the pleadings and evidence submitted in conjunction therewith, and upon hearing argument of counsel thereon, including argument on Plaintiff's lack of compliance with Local Rule 6, ORDERED AS FOLLOWS:

1. Pursuant to Defendants' Additional Request For Sanctions and Plaintiff's failure to comply with Local Rule 6, Plaintiff and Plaintiff's counsel were



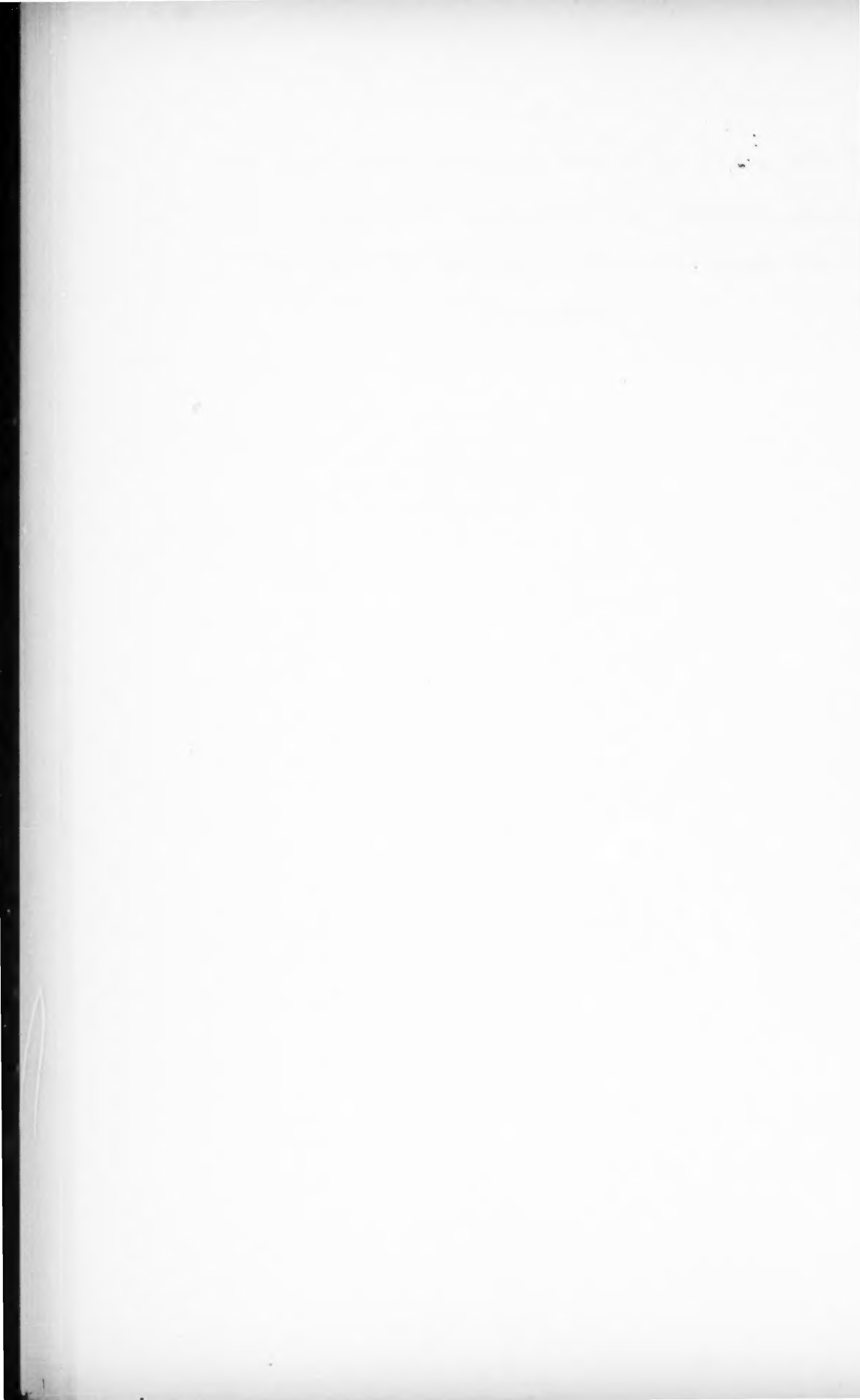
ordered to pay sanctions in the total sum of \$990.00 (based upon 6 hours of attorney time expended at the rate of \$165 an hour) due and payable to Defendants' Counsel forthwith.

Dated: March 31, 1987 /s/
Chief Judge
Manuel L. Real

Submitted by:

SACKS & ZWEIG

By /s/
Michael K. Zweig
Attorneys for Defendants,
Counter-Claimants and Cross-
Claimants Konstantin Thoeren,
Patrola Films, Inc. and Patrola,
G.M.B.H.



APPENDIX IV

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL
CORPORATION,
a California
corporation,

Plaintiff

VS.

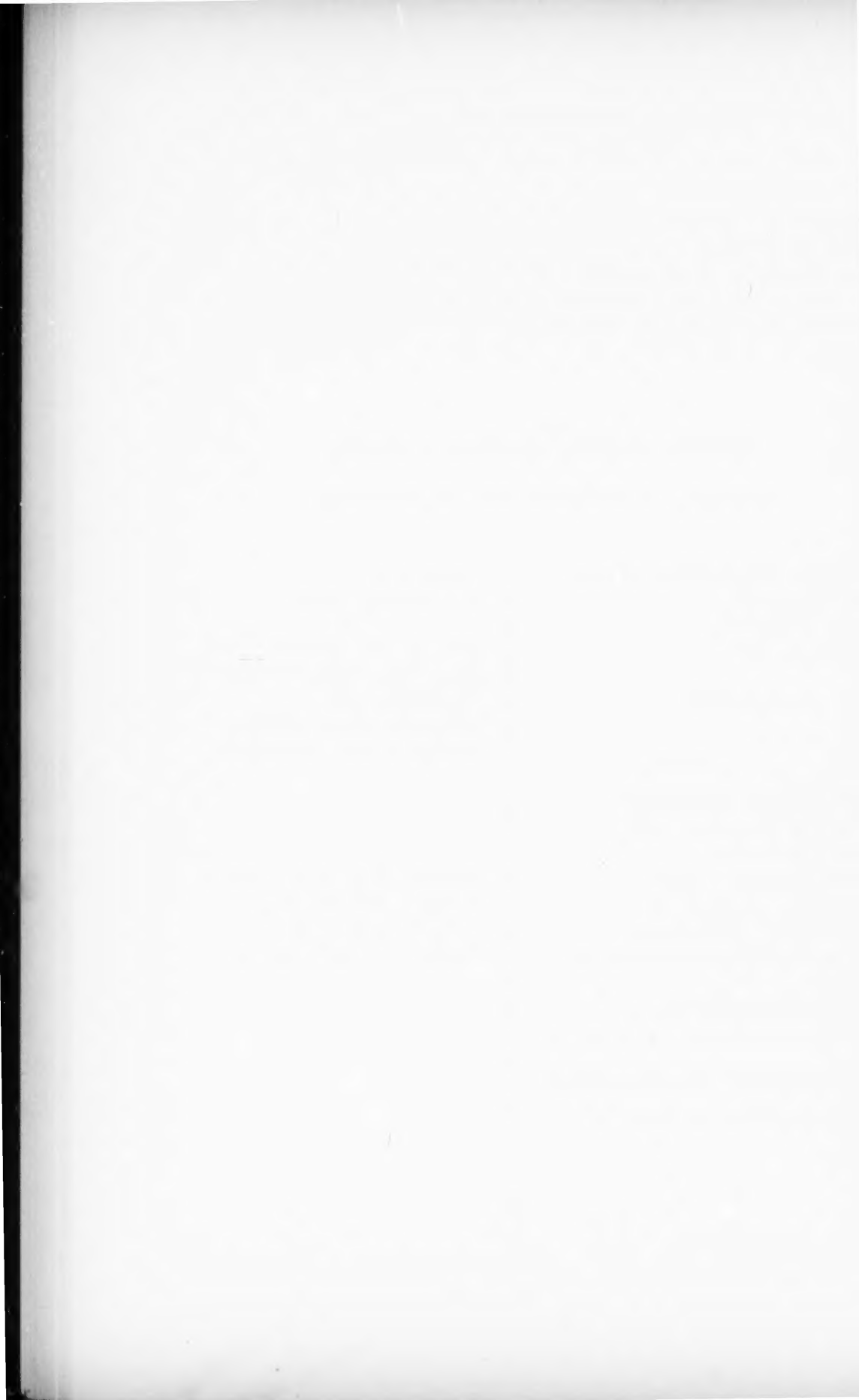
KONSTANTIN THOEREN,
PATROLA FILMS, INC.
a California
corporation, and
PATROLA, G.M.B.H.,
a Federal Republic
of Germany corporation

Defendants.

) Case No.
) CV-86-6775-R
)
) ORDER RE SANCTIONS
) AGAINST PLAINTIFF'S
) COUNSEL IN
) CONJUNCTION WITH
) MOTION RE CONTEMPT

Date: May 19, 1987
Time: 10:00 a.m.
Courtroom: 8
Trial Date: None

AND RELATED CROSS-ACTION



Defendants "Motion to Hold Plaintiff and Plaintiff's Counsel In Contempt and Request For Additional Sanctions" ("Motion") came on for hearing before the Honorable United States Chief District Judge Manual L. Real in Courtroom 8 on May 19, 1987 at 1:30 p.m. in the above-referenced action. Michael K. Zweig of Sacks & Zweig appeared on behalf of Defendants Konstantin Thoeren, Patrola Films, Inc. and Patrola G.M.B.H. John Riddet of Aronson & Riddet appeared on behalf of the law offices of L. Burke Lewis, but not on behalf of Plaintiff or Defendants. Arthur Martin and Amy Cassedy of the Law Offices of L. Burke Lewis appeared on behalf of Plaintiff Adriana International Corporation.

Upon consideration of all of the papers submitted in support of and in opposition to the Motion, and upon hearing oral argument thereon, and good cause appearing,

IT IS ORDERED that Defendants' Motion is granted; based upon the refusal of



Plaintiff and Plaintiff's counsel, Law Office of L. Burke Lewis, to obey this Court's oral Orders of March 16, 1987 and March 24, 1987 and the written orders of March 31, 1977 memorializing same, to pay sanctions to Defendants in the amounts of \$4,995.00 and \$990.00 "forthwith", Plaintiff and Plaintiff's counsel were in contempt of this Court until payment of such sanctions was made on May 6, 1987.

IT IS FURTHER ORDERED, based on the foregoing, and based upon the Declarations of Michael K. Zweig submitted in conjunction with the Defendants' Motion and based upon his representations in Court, that sanctions are ordered in conjunction with the Motion in the amount of \$2,520.00 in favor of Defendants and against Plaintiff's counsel, Law Offices of L. Burke Lewis, to be paid by Plaintiff's counsel, which sanctions are not due or payable until adjudication of this action by this Court.



Dated: June 4, 1987

/s/

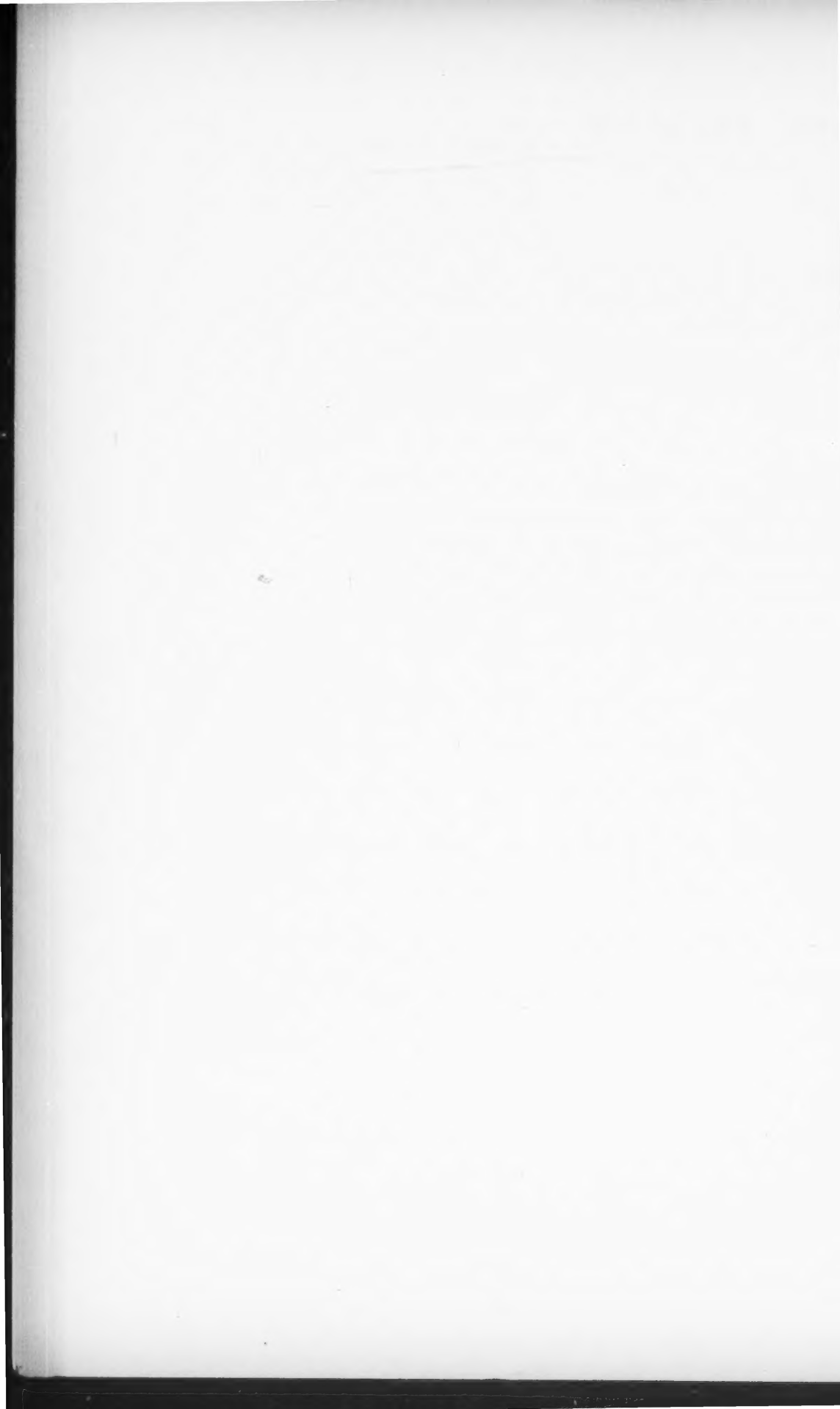
Manuel L. Real
United States Chief
District Judge

Submitted by:

SACKS & ZWEIG

By /s/

Michael K. Zweig
Attorneys for Defendants,
Counter-Claimants and Cross-
Claimants Konstantin Thoeren,
Patrola Films, Inc. and Patrola,
G.M.B.H.



APPENDIX V

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL)	Case No.
CORPORATION,	)	CV-86-6775-R
a California)	
corporation,	)	ORDER DISMISSING
	)	COMPLAINT, STRIKING
Plaintiff	)	ANSWERS TO COUNTER-
	)	CLAIM AND ENTERING
vs.	)	DEFAULT THEREON,
	)	AND AWARDING
KONSTANTIN THOEREN,	)	MONETARY SANCTIONS
PATROLA FILMS, INC.	)	[F.R.C.P. Rule 37]
a California)	
corporation, and	)	Date:
PATROLA, G.M.B.H.,	)	February 8, 1988
a Federal Republic	)	Time: 10:00 a.m.
of Germany corporation	)	Courtroom: 8
)	
Defendants.)	
)	
)	
AND RELATED CROSS-ACTION)	
)	

The Motion of Defendants, Counter-Claimants and Cross-Claimants Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. (collectively "Thoeren") entitled "Motion of Thoeren To Dismiss Complaint; Strike Answers And Enter Default On Counter-Claims; And Award Monetary Sanctions" (hereinafter "Motion") came on for hearing before the Honorable Judge Manuel Real in Courtroom 8 of the above entitled Court on January 11, 1988 at approximately 10:00 a.m. L. Burke Lewis and Amy Cassedy of Lewis & Company appeared on behalf of Plaintiff and Counter-Defendant Adriana International Corp. ("Plaintiff") and on behalf of Cross-Defendants Hans Kunz, A. M. Midgen, Kemal Zeinal-Zade and Arian Films Productions Limited ("Cross-Defendants"). Michael K. Zweig of Sacks & Zweig appeared on behalf of Thoeren. The Court, having reviewed and considered all of the Memoranda of Points and Authorities, Declarations, Exhibits, Motions to Strike and other documents submitted in

support of and in opposition to the Motion, heard oral argument thereon, and upon hearing such oral argument, continued the hearing on the Motion to permit Plaintiff and Cross-Defendants to file additional papers related to the Motion. The Motion thereafter came on for hearing again on February 8, 1988 in Courtroom 8 of the above entitled Court before the Honorable Chief Judge Manuel Real at approximately 10:00 a.m. with the same counsel appearing for the same parties.

The Court having considered all of the above referenced papers submitted in support of and in opposition to the Motion, and having reviewed and considered the additional papers filed after the January 11, 1988 hearing both in support of and in opposition to the Motion, and after duly considering oral argument on the Motion both on January 11, 1988 and February 8, 1988, the Court orders as follows:

Pursuant to F.R.C.P.. Rule 37(b) and (d), based upon the willful, persistent and



continuing refusals of Plaintiff and all Cross-Defendants, acting in concert through their joint counsel, Lewis & Company, to produce discovery in this action, to obey the Orders of this Court and to obey the Orders of the Special Master appointed by this Court, as set forth in the Motion, including inter alia, their failure to produce documents as ordered by the court on March 3, 1987 and subsequently by the Special Master, their failure to appear for depositions as ordered by the Special Master on June 23, 1987 for July 7, 8, 9 and 10, 1987, their failure to appear for depositions as ordered by this Court on November 23, 1987 for December 14, 15 and 16, 1987, and their failure to show good cause therefore, their failure to make themselves available for deposition in June 1987 and in making misrepresentations regarding such depositions, and their failure to provide accurate information about the identity of Cross-Defendant Arian Films Productions

Limited to Thoeren as ordered by the Special Master on March 23, 1987,

IT IS ORDERED THAT:

1. Plaintiff's Complaint is dismissed with prejudice.

2. The "First Amended Answer of Cross-Defendants Adriana, Kunz, Zade and Midgen To First Amended Cross-Claim" dated December 9, 1987 is stricken.

3. Default is entered against Adriana International Corp., A. M. Midgen, Hans Kunz, Kemal-Zeinal Zade and Arian Films Productions Limited on Thoeren's "First Amended Cross-Claim" dated August 7, 1987.

4. Monetary sanctions are awarded against the Plaintiff and Cross-Defendants and their counsel, Lewis & Company, jointly and severally, pursuant to FRCP Rule 37(b) for the attorneys' fees and costs incurred by Thoeren in bringing the instant Motion in the total amount of \$6,440.00 [substantiated as follows: Declaration of Michael K. Zweig dated December 21, 1987, paragraph 3 (\$3,650.00)



submitted with the Motion; Declaration of Michael K. Zweig dated January 5, 1988, paragraph 5 (\$1,740.00) submitted with the Reply Brief in conjunction with the Motion; plus six additional hours of Mr. Zweig's time at \$175.00 an hour (\$1,050) for the attendant Court appearances on the Motion on January 11, 1988 and February 8, 1988] in that such Motion was necessitated by the frivolous and dilatory tactics of Plaintiff and Cross-Defendants and their counsel in refusing to provide discovery, and their refusals to comply with the above referenced orders of the Court and the Special Master, which refusals were not substantially justified.

Dated: February 25, 1988 /s/
Chief District Judge
Manuel L. Real

Submitted by:

SACKS & ZWEIG



By /s/

Michael K. Zweig, Attorneys For
Defendants, Counter-Claimants
and Cross-Claimants Konstantin
Thoeren, Patrola Films, Inc.
and Patrola, G.M.B.H.

APPENDIX VI

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL)	Case No.
CORPORATION,	)	CV-86-6775-R
a California)	
corporation,	)	ORDER RE
	)	CROSS-DEFENDANT
Plaintiff	)	ARIAN FILMS
	)	PRODUCTIONS
vs.	)	LIMITED'S MOTION
	)	TO DISMISS FOR LACK
KONSTANTIN THOEREN,	)	OF PERSONAL
PATROLA FILMS, INC.	)	JURISDICTION
a California)	
corporation, and	)	Date:
PATROLA, G.M.B.H.,	)	February 8, 1988
a Federal Republic	)	Time: 10:00 a.m.
of Germany corporation	)	Courtroom: 8
)	
Defendants.)	
)	
)	
AND RELATED CROSS-ACTION)	
)	



The Motion of Cross-Defendant Arian Films Productions Limited ("AFP") entitled "Motion To Dismiss For Lack Of Personal Jurisdiction" (hereafter "Motion") came on for hearing before the Honorable Chief Judge Manuel Real in Courtroom 8 of the above entitled Court on November 23, 1987 at approximately 10:00 a.m. Amy Cassedy of Lewis & Company appeared on behalf of Cross-Defendant AFP. Michael K. Zweig of Sacks & Zweig appeared on behalf of Cross-Claimants Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. (collectively "Thoeren"). The Court, having reviewed all of the Memoranda of Points and Authorities, Declarations, Exhibits, Motions to Strike and other documents submitted in support of and in opposition to the Motion, and having heard oral argument thereon, continued the hearing on the Motion to January 11, 1988, to be heard after the Court ordered depositions of Hans Kunz ("Kunz") and Kemal Zeinal-Zade ("Zade"), agents of AFP. The Motion thereafter came on

for hearing again on January 11, 1988 with L. Burke Lewis and Amy Cassedy of Lewis & Co. appearing on behalf of AFP, and Michael K. Zweig appearing on behalf of Thoeren, at which time the court noted that Kunz and Zade had refused to appear for their Court ordered depositions and further continued the hearing. The Motion came on for hearing again on February 8, 1988 in Courtroom 8 of the above entitled Court before the Honorable Chief Judge Manuel Real at approximately 10:00 a.m. with L. Burke Lewis and Amy Cassedy appearing for AFP and Michael K. Zweig appearing for Thoeren.

The court having considered all of the above referenced papers submitted in support of an in opposition to the Motion, and the failure of Kunz and Zade to appear for deposition as ordered, and after considering oral argument thereon,

IT IS ORDERED THAT:

Based upon AFP's purposeful, regular and systematic contact with the State of

California, through its representatives, counsel, officers, directors and financiers, including Anthony M. Midgen, Hans Kunz and Kemal Zeinal-Zade, and further based upon the claims alleged against AFP in this action arising out of its contacts with the State of California, including the issuance of stock in Adriana to AFP in California, the holding of said stock in California by counsel for AFP, the assumption of possession of and transference of said stock out of California by counsel for AFP, and the agreement entered into in California and the attendant misrepresentations as alleged by Thoeren regarding AFP holding Adriana stock in trust for Thoeren, personal jurisdiction over AFP herein is established and the Motion is denied.

Dated: February 8, 1988

Chief District Judge
Manuel L. Real

Submitted by:

SACKS & ZWEIG

By /s/

Michael K. Zweig, Attorneys For
Defendants, Counter-Claimants
and Cross-Claimants Konstantin
Thoeren, Patrola Films, Inc.
and Patrola, G.M.B.H.

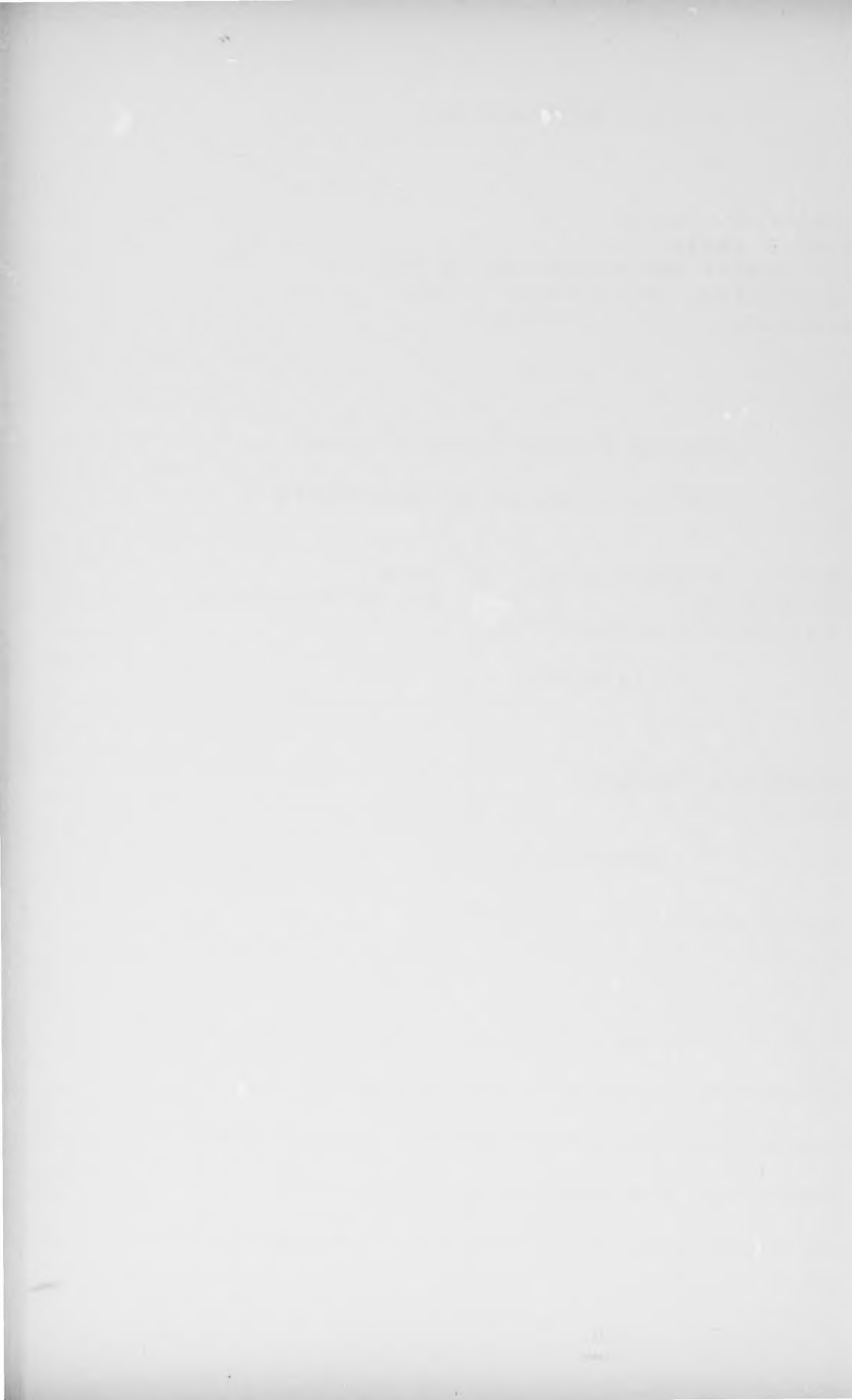
APPENDIX VII

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Telephone: (213) 550-6363

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL	)	Case
CORPORATION	)	No. CV-86-6775-R
a California corporation)	
)	
Plaintiff,)	
	)	ORDER
v.)	
)	
KONSTANTIN THOEREN,)	
et. al.,)	
)	
Defendants.)	
)	
)	

Pursuant to Rule 37(b) and (d) of
the Federal Rules of Civil Procedure the
complaint of plaintiff ADRIANA INTERNATIONAL
CORPORATION was dismissed for willful,
persistent and continuing obstreperous conduct

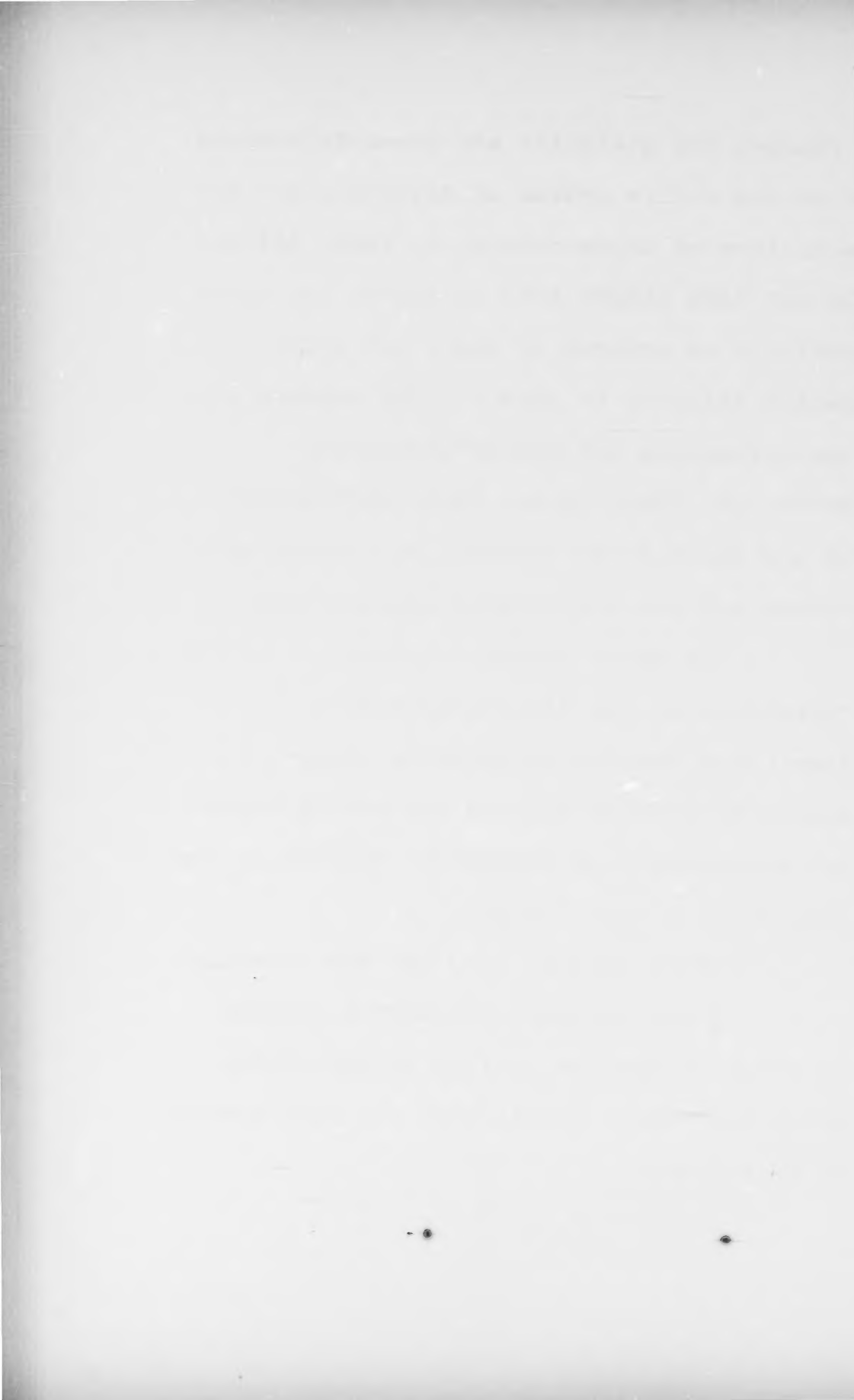


by counsel for plaintiff and cross-defendants during the entire course of discovery and for the failure of cross-defendants KEMAL ZEINAL-ZADE and HANS ALBERT KUNZ to appear for their deposition as ordered by the court after repeated failures to appear. The answers of cross-defendants ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE, HANS ALBERT KUNZ and ARIAN FILMS PRODUCTIONS LIMITED were stricken and default entered against them.

The Court having received declarations of the liquidated and unliquidated damages suffered by cross-claimant KONSTANTIN THOEREN and having heard cross-examination of KONSTANTIN THOEREN on the unliquidated damage claims.

IT IS ORDERED ADJUDGED AND DECREED:

Cross-claimant KONSTANTIN THOEREN have judgment against ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE and HANS ROBERT KUNZ as follows:



1. For breach of contract and fraud in the sum of \$5,120,000 on his 1st claim for relief
2. \$5,120,000 on his 2nd claim for relief for breach of covenant of good faith and fair dealing
3. \$5,120,000 on his 3rd claim for relief for fraud
4. That KONSTANTIN THOEREN is owner of a 30% stock interest in cross-defendant ADRIANA INTERNATIONAL CORPORATION
5. Cross-defendant ADRIANA INTERNATIONAL CORPORATION is ordered to transfer a 30% stock interest to KONSTANTIN THOEREN
6. \$200,000 for emotional distress on his 3rd claim for relief
7. \$1,000,000 punitive damages against cross-defendant ADRIANA INTERNATIONAL CORPORATION



8. \$750,000 punitive damages
against cross-defendant KEMAL
ZEINAL-ZADE
9. \$750,000 punitive damages
against cross-defendant HANS
ALBERT KUNZ
10. Cost of suit in the amount of
\$ _____.

DATED: April 13, 1988.

/s/

MANUAL L. REAL
UNITED STATES DISTRICT COURT

APPENDIX VIII

Michael K. Zweig
SACKS & ZWEIG
9255 Sunset Boulevard, Suite 620
Los Angeles, California 90069
Telephone: (213) 550-6363

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL	)	Case No.
CORPORATION, a)	
corporation,	)	AMENDED ORDER
)	
Plaintiff)	
)	
vs.)	
)	
KONSTANTIN THOEREN,)	
PATROLA FILMS, INC.)	
a California)	
corporation, and)	
PATROLA, G.M.B.H.,)	
a Federal Republic)	
of Germany corporation)	
)	
Defendants.)	
)	
)	
KONSTANTIN THOEREN, as)	
an individual and as a)	
shareholder on behalf)	
of Adriana)	
International)	
Corporation,)	
a California)	
corporation,)	

PATROLA FILMS, INC.)
a California)
corporation, and)
PATROLA, G.M.B.H.)
a Federal Republic)
of Germany)
Corporation,)
)
Counter Claimants)
and Cross-Claimants)
)
vs.)
)
ADRIANA INTERNATIONAL)
CORPORATION,)
a California)
corporation,)
KEMAL ZEINAL-ZADE,)
an individual,)
HAHNS ALBERT KUNTZ,)
an individual,)
A. M. MIDGEN,)
an individual)
and GIPSON, HOFFMAN)
& PANCIONE,)
a California business)
entity,)
and ARIAN FILMS)
PRODUCTIONS LIMITED,)
a Bahamian Corp.)
)
Counter-Defendant)
and Cross Defendants)
)

This Order shall correct and modify
this Court's prior Order date April 13, 1988
and entered April 14, 1988 herein, pursuant to
Federal Rules of Civil Procedure, Rule 60(a).

Pursuant to Rules 37(b) and (d) of the Federal Rules of Civil Procedure, the Complaint of Plaintiff ADRIANA INTERNATIONAL CORPORATION was dismissed for willful persistent and continuing obstreperous conduct by counsel for Plaintiff and Cross-Defendants during the entire course of discovery and for failure of Cross-Defendants KEMAL ZEINAL-ZADE and HANS ALBERT KUNZ to appear for their deposition as ordered by the Court after repeated failures to appear. The answers of Cross-Defendants ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE, HANS ALBERT KUNZ, A. M. MIDGEN and ARIAN KUNZ, A. M. MIDGEN LIMITED were stricken and default entered against them.

The Court having received declarations from all parties on the liquidated and unliquidated damages suffered by Cross-Claimant KONSTANTIN THOEREN and having hear cross-examination of KONSTANTIN THOEREN on the unliquidated damage claims,

IT IS ORDERED ADJUDGED AND DECREED:

Cross-Claimant KONSTANTIN THOEREN

have judgment against Cross-Defendants as follows:

1. Against ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE and HANS ALBERT KUNZ in the sum of \$5,120,000.00 on THOEREN first claim for relief for breach of contract.
2. Against ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE and HANS ALBERT KUNZ in the sum of \$5,120,000.00 on THOEREN second claim for relief for breach of the covenant of good faith and fair dealing.
3. Against KEMAL ZEINAL-ZADE, HANS ALBERT KUNZ and ANTHONY M. MIDGEN in the sum of \$5,370,000.00 on THOEREN third claim for relief for fraud.
4. Against ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE,



HANS ALBERT KUNZ, ANTHONY M.
MIDGEN and ARIAN FILMS
PRODUCTIONS LIMITED that
KONSTANTIN THOEREN is the owner
of a 30% stock interest in
ADRIANA INTERNATIONAL
CORPORATION.

5. Cross-Defendants ADRIANA
INTERNATIONAL CORPORATION and
ARIAN FILMS PRODUCTIONS LIMITED
are ordered to transfer a 30%
stock interest to KONSTANTIN
THOEREN.
6. Against KEMAL ZEINAL-ZADE, HANS
ALBERT KUNZ and ANTHONY M.
MIDGEN in the sum of
\$200,000.00 for THOEREN'S
emotional distress on Thoeren's
third claim for relief for
fraud.
7. Against Cross-Defendant ANTHONY
M. MIDGEN in the sum of
\$165,000.00 on Thoeren's



twelfth claim for relief for
malpractice.

8. \$1,000,000.00 punitive damages
against Cross-Defendant ADRIANA
INTERNATIONAL CORPORATION.

9. \$750,000.00 on punitive damages
against Cross-Defendant KEMAL
ZEINAL-ZADE.

10. \$750,000.00 punitive damages
against Cross Defendant KEMAL
ZEINAL-ZADE.

11. ~~\$-t-----punitive~~
~~damages-against-Cross-Befendant~~
~~ANTHONY-M--MIDGEN-~~

12. Against ANTHONY M. MIDGEN and
in favor of ADRIANA
INTERNATIONAL CORPORATION based
on Thoeren's eighth claim for
relief on behalf of Adriana in
the sum of \$88,501.00.

13. Against KEMAL ZEINAL-ZADE and
in favor of ADRIANA
INTERNATIONAL CORPORATION based

on Thoeren's eighth claim for
relief on behalf of Adriana in
the sum of \$30,000.00.

14. Costs of suit ~~in-the-amount-of~~
\$-----

DATED: April 29, 1988.

/s/
MANUAL L. REAL
UNITED STATES DISTRICT COURT

By /s/
Michael K. Zweig, Attorneys For
Defendants, Counter-Claimants
and Cross-Claimants Konstantin
Thoeren, Patrola Films, Inc.
and Patrola, G.M.B.H.



APPENDIX IX

Michael K. Zweig
SACKS & ZWEIG
100 Wilshire Building
100 Wilshire Boulevard, Suite 1300
Los Angeles, California 90401
Telephone: (213) 451-3113

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL	)	Case
CORPORATION,	)	No. CV-86-6775-R
a California)	
corporation	)	ORDER
)	
Plaintiff)	
)	
vs.)	
)	
KONSTANTIN THOEREN,)	
PATROLA FILMS, INC.)	
a California)	
corporation, and)	
PATROLA, G.M.B.H.,)	
a Federal)	
Republic of Germany)	
corporation)	
)	
Defendants.)	
)	
)	
AND RELATED CROSS-ACTION)	
)	

The motion Of Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. entitled "Motion of Thoeren for Sanctions Against Plaintiff, Cross-Defendants and Their Attorneys" and the motion Of Cross-Defendants Adriana International Corporation, Kemal Zeinal-Zade, Hans Kunz, Anthony M. Midgen and Adriana Films Productions, Ltd. entitled "Motion For Reconsideration of Amended Order" both came on for hearing before the Honorable Chief Justice Manuel Real in Courtroom 8 of the above-entitled Court at 10:00 a.m. on July 5, 1988. Michael K. Zweig of Sacks & Zweig appeared on behalf of Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. and L. Burke Lewis and Amy Cassedy of Lewis & Company appeared on behalf of Adriana International Corporation, Kemal Zeinal-Zade, Hans Kunz, Anthony M. Midgen and Arian Films Productions Limited.

The Court, having reviewed all of the papers submitted in support of and in

opposition to both of the aforementioned motions, and hearing oral argument thereon,

IT IS ORDERED that Cross-Defendants' Motion For Reconsideration Of Amended Order is denied and Thoeren's Motion For Sanctions Against Plaintiff, Cross-Defendants and Their Attorneys is denied, except that sanctions are hereby ordered, adjudged and decreed against Adriana International Corporation, Kemal Zeinal-Zade, Hans Kunz, Anthony M. Midgen, Arian Films Productions Limited and Lewis & Company, jointly and severally, in the sum of \$2,292.50 consisting of 9.6 attorney hours at \$175.00 per hour, plus 4.0 attorney hours at \$125.00 per hour as set forth in the Declaration of Michael K. Zweig dated July 8, 1988. The sanctions are based upon the findings of this Court that Cross-Defendants' Motion for Reconsideration of Amended Order violated Rule 11 of the Federal Rules of Civil Procedure, was not well grounded in fact or brought in good faith, and totally failed to meet the requirements of Central District

Local Rule 7.16. The aforesaid sanctions are payable on or before _____, 1988.

DATED: July 26, 1988

/s/
CHIEF DISTRICT JUDGE
MANUEL REAL

Submitted by:

SACKS & ZWEIG

By /s/

Michael K. Zweig
Attorneys for Konstantin Thoeren,
Patrola Films, Inc.
and Patrola, G.M.B.H.

APPENDIX X

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL CORPORATION	)	No. 88-6107
Plaintiff-)	
counter-defendant-	)	D.C. No.
Appellant	)	CV-86-6775-R
)	
vs.	)	ORDER
)	
LEWIS & COMPANY;)	
L. BURKE LEWIS;)	
AMY J. CASSEDY;)	
ARTHUR L. MARTIN)	
)	
Intervenors-)	
Appellants)	
)	
vs.)	
)	
KONSTANTIN THOEREN;)	
PATROLA FILMS, INC.)	
PATROLA, G.M.B.H.)	
)	
Defendants-)	
counter-claimants)	
Appellees)	
)	
vs.)	
)	
HANS A. KUNZ;)	
ANTHONY M. MIDGEN;)	
KEMAL ZEINAL-ZADE;)	
ARIAN FILMS)	
PRODUCTIONS LTD.)	
)	
Third-party-)	
defendants-)	
Appellants)	

BURKE LEWIS;
AMY J. CASSEDY;
ARTHUR PRODUCTIONS, LTD.
LEWIS & COMPANY

No. 88-6424

Plaintiff-
counter-defendant-
cross-defendants-
Appellants

vs.

KONSTANTIN THOEREN,
et. al.;
PATROLA FILMS, INC.;
PATROLA, G.M.B.H.

Defendant-
counter-claimant-
cross-claimant-
Appellees

BEFORE: ALARCON, BRUNETTI, and O'SCANNLAIN,
Circuit Judges

The motion of Lewis & Company, Lawyers,
L. Burke Lewis, and Amy J. Cassedy for
clarification of the October 5, 1990 Order of
this court is denied.

The order allowing the filling of the
late petition for rehearing dated
September 25, 1990, is vacated. The petition
for rehearing by appellants Adriana
International Corporation, Arian Films
Productions, Ltd., Kemal Zeinal-Zade, Hans
Albert Kunz and Anthony M. Midgen, is denied
as untimely.¹

The petition for rehearing and suggestion
for rehearing en banc by L. Burke Lewis, Amy
J. Cassedy, and Lewis & Company, Lawyers, is
denied as untimely.¹

¹ Rule 25, F.R.A.P., states "filing may be accomplished by mailing addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing . . ." The petitions are not "briefs and appendices" and as such were filed untimely.

The request of appellees, Konstantin Thoeren, Patrola Films, Inc., Patrola G.M.B.H., for attorney's fees and double costs in the sum of \$73,101.00 is granted with joint and several liability assigned to Adriana and Lewis.

APPENDIX XI

Michael K. Zweig
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Los Angeles, California 90069
Telephone: (213) 550-6363

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.)	
)	
Plaintiff-)	
counter-defendant/)	
Appellant)	
)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
)	
LEWIS & COMPANY,)	
et. al.,)	
)	
Intervenors/)	
Appellants,)	
)	
KONSTANTIN THOEREN,)	
et. al.,)	
)	
Defendants-)	
counter-claimants/)	
Appellees)	
)	
vs.)	
)	
HANS A. KUNZ, et. al.,)	
)	
Third-party)	

No. 88-6107, 88-6424

defendants/)	
Appellants.)	
<hr/>		
BURKE LEWIS, et. al.,	)	No. 88-6424
Appellants,)	
and	)	DC# CV-86-6775-MLR
	)	Central California
A. KUNZ, et. al.,)	
Plaintiffs-)	
counter-defendants-)	
cross-defendants/)	
Appellants)	
vs.)	
Defendants-	)	ORDER
counter-claimant-)	
cross-claimants/)	
Appellees)	
<hr/>		

Before: NOONAN, Circuit Judge

Appellee's motion to strike appellant's
briefs is denied. Appellees may file a brief
of no more than 60 pages on or before
September 29, 1989.

Appellants may file reply briefs of no
more than 20 pages each on or before
October 13, 1989.



APPENDIX XII

Michael K. Zweig
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Telephone: (213) 550-6363

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL CORPORATION, etc.	)	Nos. 88-6107
)	
Plaintiff-)	
counter-defendant/)	
Appellant)	
)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
)	
LEWIS & COMPANY,)	
et. al.,)	
)	
Intervenors/)	
Appellants,)	
)	
KONSTANTIN THOEREN,)	
et. al.,)	
)	
Defendants-)	
counter-claimants/)	
Appellees)	
)	
vs.)	
)	
)	



No. 88-6107, 88-6424

HANS A. KUNZ, et. al.,)
)
Third-party)
defendants/)
Appellants.)
)

BURKE LEWIS, et. al.,)
)
Appellants,)
)
and)
)

No. 88-6424

DC# CV-86-6775-MLR
Central California

A. KUNZ, et. al.,)
)
Plaintiffs-)
counter-defendants-)
cross-defendants/)
Appellants)
)

vs.)
)

Defendants-)
counter-claimant-)
cross-claimants/)
Appellees)
)

ORDER

Before: SNEED, Circuit Judge

The motion of Appellants Adriana
International Corporation, Arian Films
Productions, Ltd., Kemal Zeinal Zade, Hans-
Albert Kunz and Anthony M. Midgen to
substitute Bertram Fields, Michael K. Collins
and the firm of Greenberg, Glusker, Fields,



No. 88-6107, 88-6424

Claman & Machtinger as attorneys of record in place of L. Burke Lewis, Amy J. Cassedy and the firm of Lewis & Company is granted.

Lewis & Company shall transfer the case file to new counsel within 7 days of entry of this order.

The optional reply brief of Appellants Adriana International Corporation, Arian Films Production, Ltd., Kemal Zeinal Zade, Hans-Albert Kunz and Anthony M. Midgen is due 28 days from entry of this order.

The optional reply brief of Intervenor/Appellants is due 14 days thereafter. Intervenor/Appellants shall brief those discrete issues involving Lewis & Company.



APPENDIX XIII

Michael K. Zweig
SACKS & ZWEIG
9255 Sunset Boulevard, Suite 620
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Telephone: (213) 550-6363

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.)	
)	
Plaintiff-)	
counter-defendant/)	
Appellant)	
)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
)	
LEWIS & COMPANY,)	
et. al.,)	
)	
Intervenors/)	
Appellants,)	
)	
KONSTANTIN THOEREN,)	
et. al.,)	
)	
Defendants-)	
counter-claimants/)	
Appellees)	
)	
vs.)	
)	



No. 88-6107, 88-6424

HANS A. KUNZ, et. al.,)
)
Third-party)
defendants/)
Appellants.)
)

BURKE LEWIS, et. al.,)
)
Appellants,)
)
and)
)

No. 88-6424

DC# CV-86-6775-MLR
Central California

A. KUNZ, et. al.,)
)
Plaintiffs-)
counter-defendants-)
cross-defendants/)
Appellants)
)

vs.)
)

Defendants-)
counter-claimant-)
cross-claimants/)
Appellees)
)

ORDER

Before: SNEED, Circuit Judge

The motion of Lewis & Company for reconsideration of the order entered January 30, 1990, is referred to the next available motions panel for disposition.

The motion of Lewis & Company for a stay of the transfer of the case file to new

No. 88-6107, 88-6424

counsel pending disposition of the motion for reconsideration is granted.

The briefing schedule is vacated. A new schedule will be set upon disposition of the motion for reconsideration.

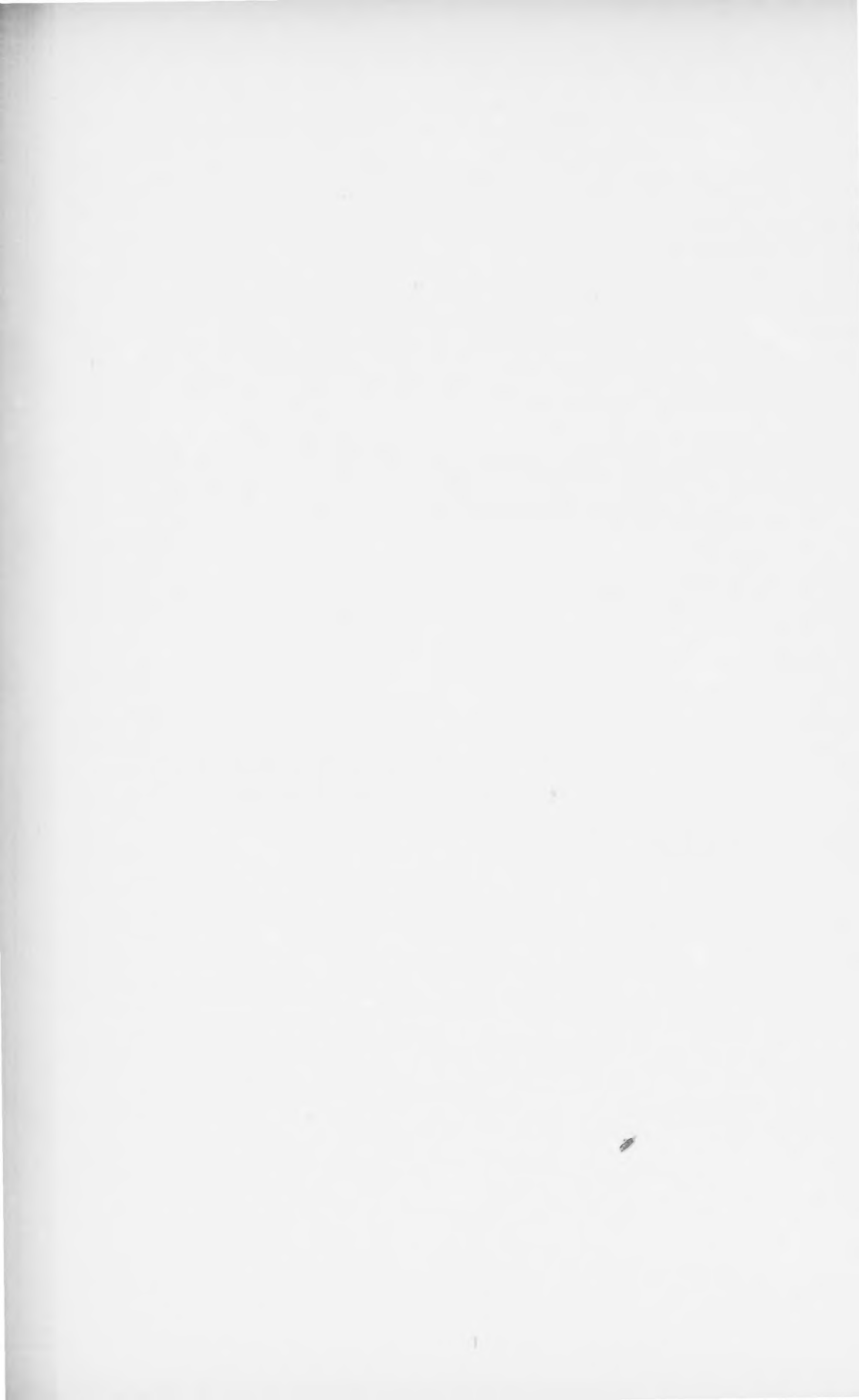


APPENDIX XIV

Michael K. Zweig
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL)	Nos. 88-6107
CORPORATION, etc.	)	88-6424
)	
Plaintiff-)	
counter-defendant/)	
Appellant)	
)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
)	
LEWIS & COMPANY,)	
et. al.,)	
)	
Intervenors/)	
Appellants,)	
)	
KONSTANTIN THOEREN,)	
et. al.,)	
)	
Defendants-)	
counter-claimants/)	
Appellees)	
)	
vs.)	
)	



HANS A. KUNZ, et. al.,)
)
 Third-party)
 defendants/)
 Appellants.)
)
 _____)

Before: WALLACE and LEAVY, Circuit Judges

The motion of Lewis & Company for reconsideration of this court's January 30, 1990 order is denied. Lewis & Company shall comply with this court's January 30, 1990 order within 7 days of entry of this order. Failure to do so shall result in the imposition of sanctions.

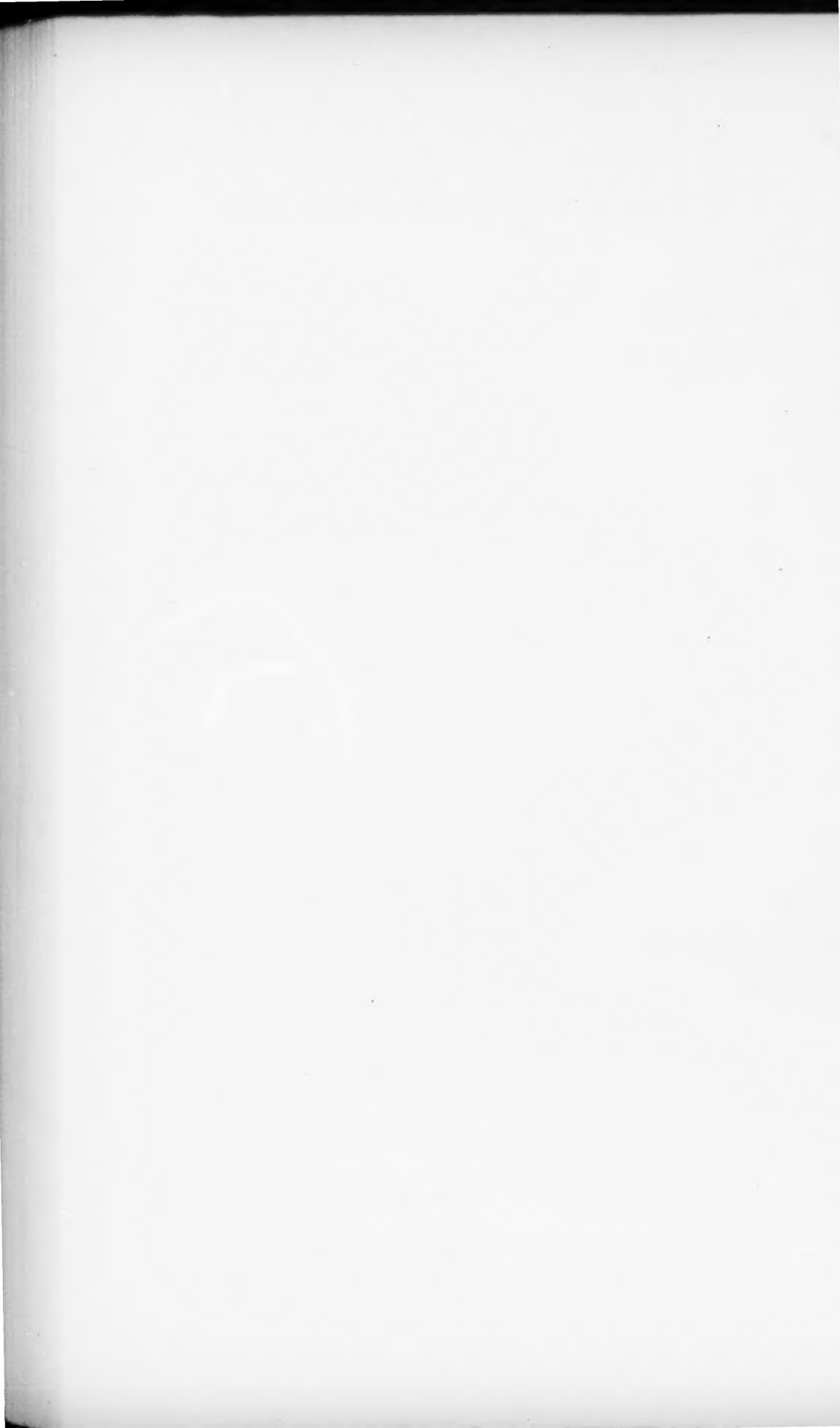
The optional consolidated reply brief of appellants Adriana International Corporation; Arian Films Production, Ltd.; Kemal Zeinal-Zade; Hans-Albert Kunz and Anthony M. Midgen is due 28 days from entry of this order.

The option reply brief of intervenors/appellants Lewis & Company is due within 14 days of service of appellants' reply brief. Intervenors/appellants shall brief those discrete issues involving Lewis &



No. 88-6107, 88-6424

Company. No further extensions of time shall
be granted.



APPENDIX XV

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.	)	88-6424
)	
Plaintiff-)	
counter-defendant/)	
Appellant)	
)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
)	
LEWIS & COMPANY,)	
et. al.,)	
)	
Intervenors/)	
Appellants,)	
)	
KONSTANTIN THOEREN,)	
et. al.,)	
)	
Defendants-)	
counter-claimants/)	
Appellees)	
)	
vs.)	
)	
HANS A. KUNZ, et. al.,)	
)	
Third-party)	
defendants/)	
Appellants.)	
)	

Before: WALLACE and LEAVY, Circuit Judges

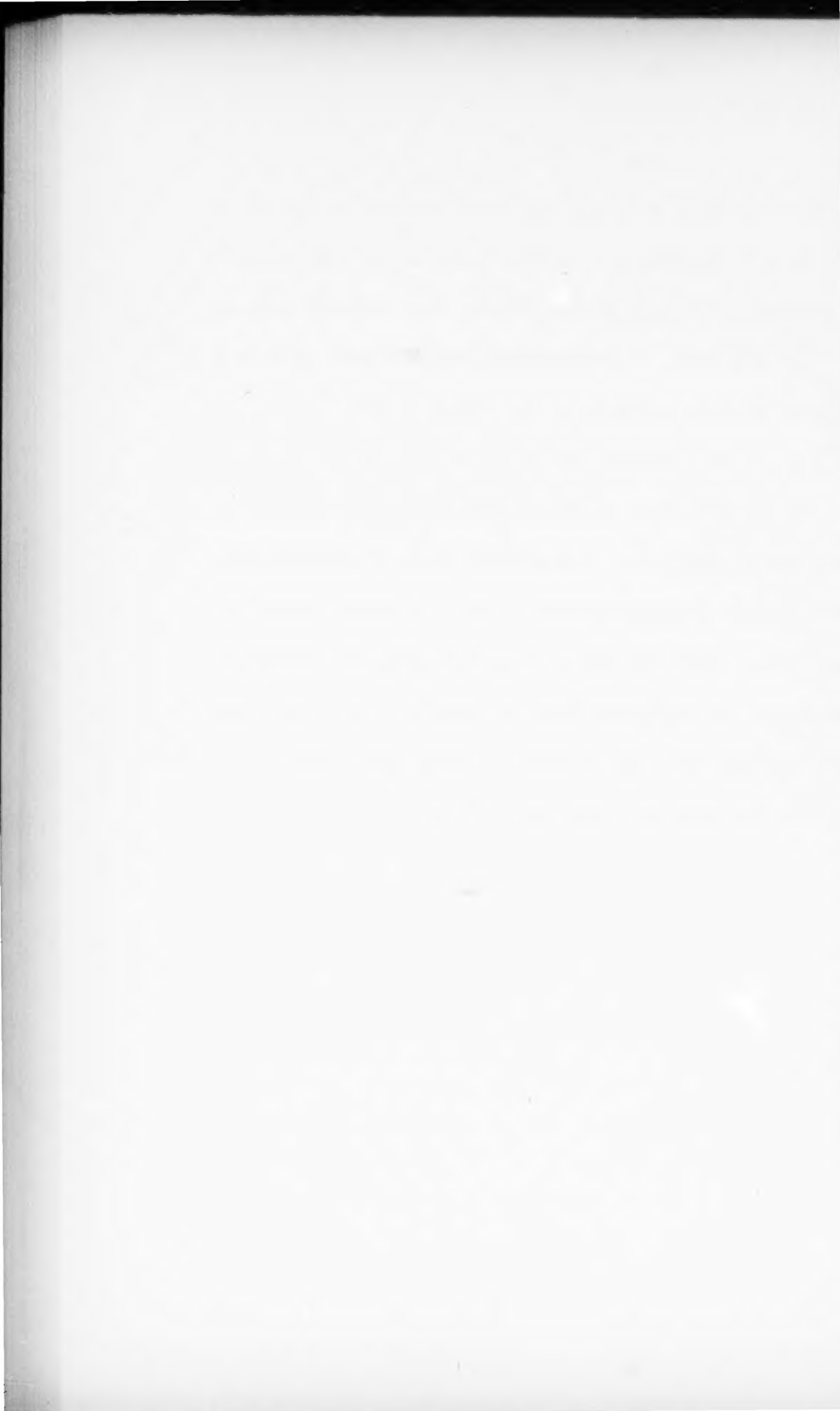
The emergency motion received on April 6,
1990 shall be deemed filed as of that date.



No. 88-6107, 88-6424

The motion for a stay of this court's April 2, 1990 order pending disposition of a petition for rehearing and suggestion for rehearing en banc is denied. Intervenor/appellant Lewis & Company shall comply with this court's April 2, 1990 order by April 13, 1990.

The optional consolidated reply brief of appellants Adriana International Corporation; Arian Films Productions, Ltd.; Kemal Zeinal-Zade; Hans-Albert Kunz and Anthony M. Midgen is due on or before May 7, 1990. The optional reply brief of intervenor/appellant Lewis & Company is due by May 21, 1990.



APPENDIX XVI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

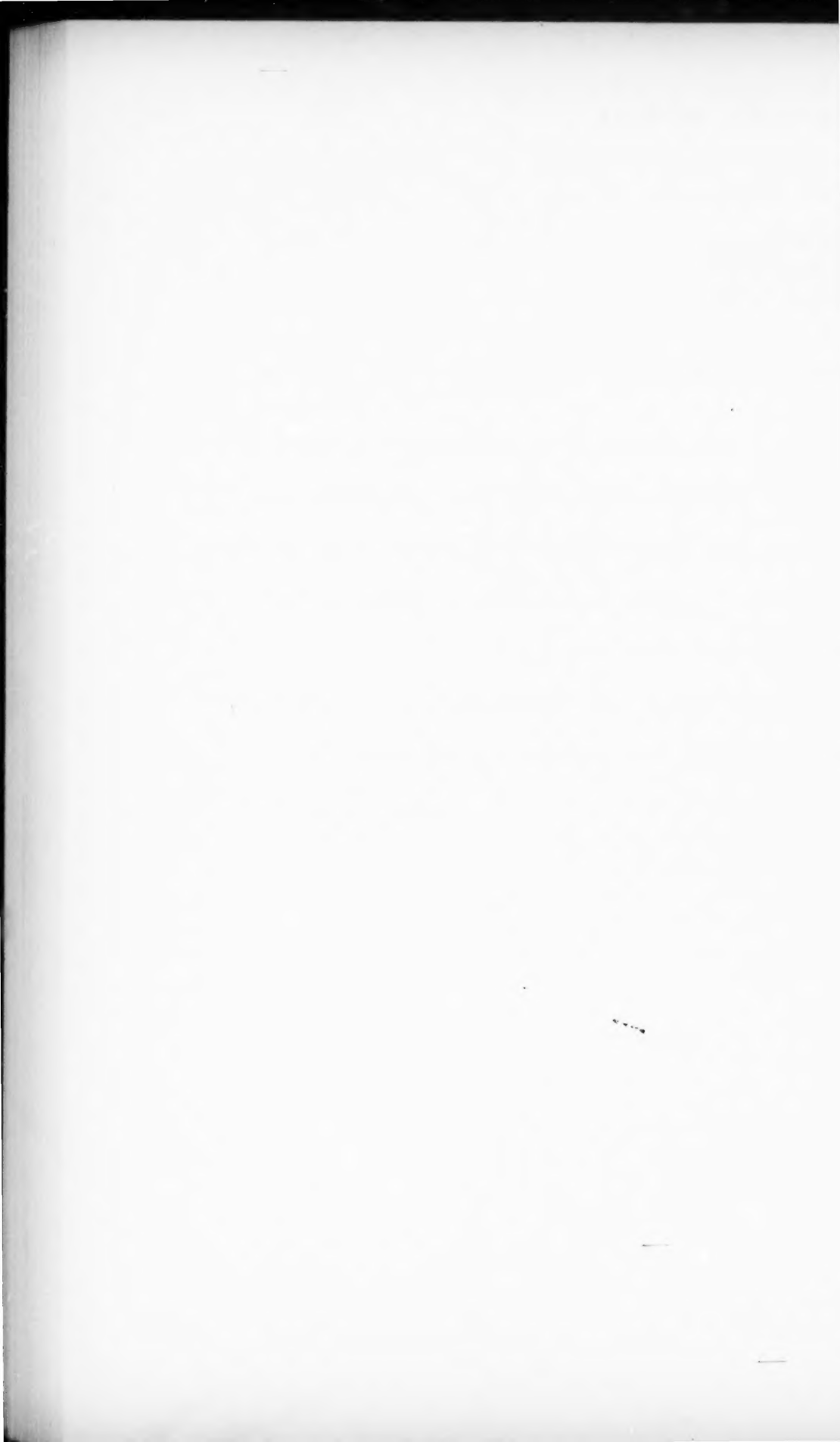
ADRIANA INTERNATIONAL)	Nos. 88-6107
CORPORATION, etc.	)	88-6424
)	
Plaintiff-)	
counter-defendant/)	
Appellant)	
)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
)	
LEWIS & COMPANY,)	
et. al.,)	
)	
Intervenors/)	
Appellants,)	
)	
KONSTANTIN THOEREN,)	
et. al.,)	
)	
Defendants-)	
counter-claimants/)	
Appellees)	
)	
vs.)	
)	



HANS A. KUNZ, et. al.,)
)
 Third-party)
 defendants/)
 Appellants.)
)

Lewis and Company's emergency motion for expedited consideration of its petition for rehearing and suggestion for rehearing en banc is granted. Lewis & Company's reply brief remains due on May 21, 1990.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.



APPENDIX XVII

Michael K. Zweig
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL)	No. 88-6107
CORPORATION)	
Plaintiff-	)	D.C. No.
counter-defendant-	)	CV-86-6775-R
Appellant)	
	)	ORDER
vs.)	
)	
LEWIS & COMPANY;)	
L. BURKE LEWIS;)	
AMY J. CASSEDY;)	
ARTHUR L. MARTIN)	
)	
Intervenors-)	
Appellants)	
)	
vs.)	
)	
KONSTANTIN THOEREN;)	
PATROLA FILMS, INC.)	
PATROLA, G.M.B.H.)	
)	
Defendants-)	
counter-claimants)	
Appellees)	
)	
vs.)	
)	

HANS A. KUNZ;)
ANTHONY M. MIDGEN;)
KEMAL ZEINAL-ZADE;)
ARIAN FILMS)
PRODUCTIONS LTD.)

Third-party-)
defendants-)
Appellants)

BURKE LEWIS;)
AMY J. CASSEDY;)
ARTHUR PRODUCTIONS, LTD.)
LEWIS & COMPANY)

No. 88-6424

Plaintiff-)
counter-defendant-)
cross-defendants-)
Appellants)

vs.)

KONSTANTIN THOEREN,)
et. al.;)
PATROLA FILMS, INC.;)
PATROLA, G.M.B.H.)

Defendant-)
counter-claimant-)
cross-claimant-)
Appellees)

BEFORE: ALARCON, BRUNETTI, and O'SCANNLAIN,
Circuit Judges

Burke Lewis, Adriana International
Corporation, A. Kunz, Anthony Midgen, and
Kemal Zade ("Adriana") are sanctioned the
reasonable amount of attorney's fees incurred



by Konstantin Thoeren as the result of Lewis filing frivolous opening briefs in this case plus double costs. Within seven days of this order THOEREN will file its declaration and brief, not to exceed 10 pages, setting forth the amount of attorney's fees it has incurred as a result of the filing of the frivolous opening briefs. Within seven days of the receipt of that brief, Lewis and Adriana will file briefs not to exceed 10 pages in response to Thoeren's declaration and brief. Upon consideration of all briefs, the court will enter an award of sanctions for the amount of reasonable attorney's fees incurred by Thoeren and double costs.



APPENDIX XVIII

Constitution, Statutes, and Rules

U.S. Const. Art. III §1 provides:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

U.S. Const. amend. V provides, in pertinent part:

"No person shall ... be deprived of life, liberty, or property, without due process of law "

U.S. Const. amend. XIV provides, in pertinent part:

"No State shall ... deprive any person of life, liberty, or property, without due process of law "

28 U.S.C. §144 provides, in pertinent part:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

28 U.S.C. §455 provides, in relevant part:

"(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.



"(b) He shall also disqualify himself in the following circumstances:

"(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

"(4) He knows that he ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

28 U.S.C. §631 provides, in relevant part:

"(a) The judges of each United States district court ... shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter

"(b) No individual may be appointed or reappointed to serve as a magistrate under this chapter unless:

"(1) He has been for at least five years a member in good standing of the bar of the highest court of a state ... and he is a member in good standing of the bar of the highest court of the State in which he is to serve ... except that an individual who does not meet the bar membership requirements of the first sentence of this paragraph may be appointed and serve as a part-time magistrate if the appointing court or courts and the conference find that no qualified individual who is a member of the bar is available to serve at a location;

"(2) He is determined by the appointing district court or courts to be competent to perform the duties of the office;

* * *

"(4) He is not related by blood or marriage to a judge of the appointing court or courts at the time of his initial appointment; and

"(5) He is selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate positions and for the establishment by the district courts of merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions.

* * *

"(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time



magistrate shall be for a term of four years "

28 U.S.C. §634 provides, in pertinent part:

"(a) Officers appointed under this chapter shall receive, as full compensation for their services, salaries to be fixed by the conference pursuant to section 633, at rates for full-time United States magistrates up to an annual rate equal to 92 percent of the salary of a judge of the district court of the United States, as determined pursuant to section 135, and at rates for part-time magistrates of not less than an annual salary of \$100, nor more than one-half the maximum salary payable to a full-time magistrate "

28 U.S.C. §636 provides, in relevant part:

"(b)(1) Notwithstanding any provision of law to the contrary --



(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, [with exceptions not relevant here]. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

* * *

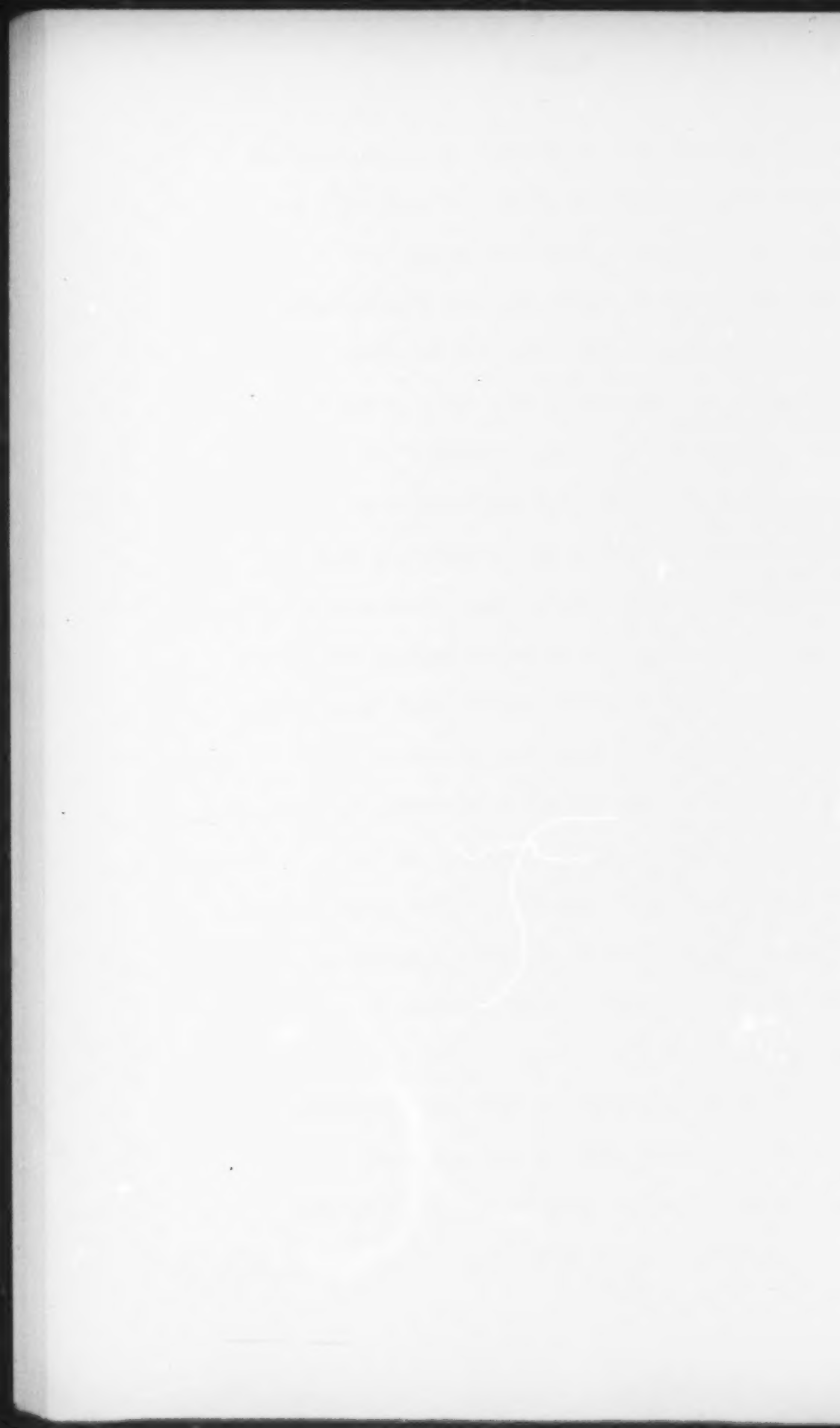
"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to

which objection is made. A judge of the court may accept reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

"(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

"(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.



"(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties."

28 U.S.C. §1927 provides, in pertinent part:

"Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Fed.R.App.P. 38 provides:

"If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

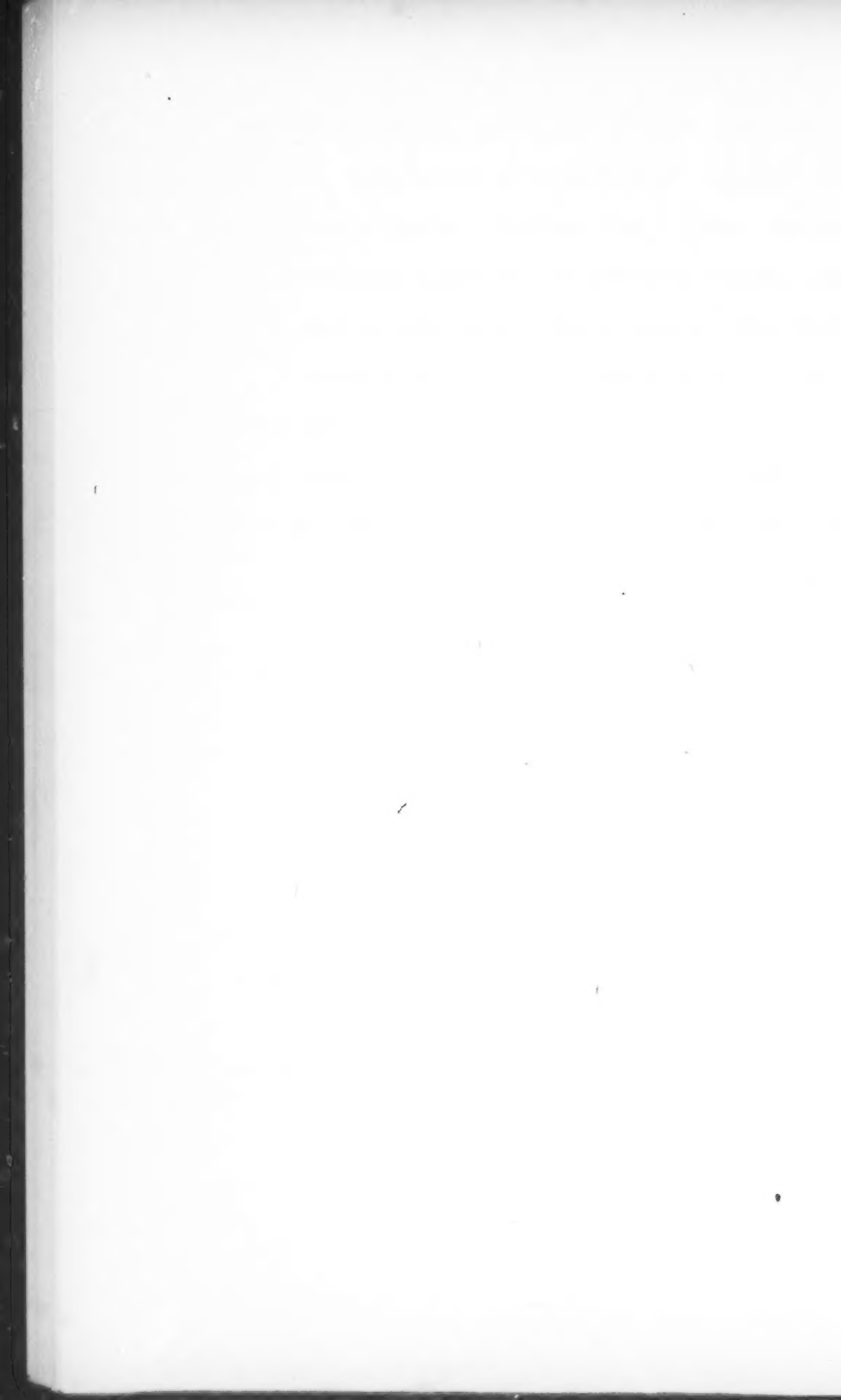
Fed. R.Civ. P. 11 provides, in relevant part:

"The signature of an attorney or party constitutes a certificate by the signed that the signer has read the



pleading, motion, or other paper; that to the best of the signer's knowledge, information,. and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation ...

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, whihc may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasoanble attorney's fee."



Fed. R.Civ. P. 26(g) provides, in pertinent part:

"Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated ... If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed."

Fed. R.Civ. P. 53 provides, in pertinent part:

"(a) The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The

compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action ... as the court may direct ... The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

"(b) A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."



Central District of California Local
Rule 25.10 provides:

"The Court may appoint a master to supervise discovery and rule upon objections to discovery by an opposing party upon stipulation of the parties or when the Court determines that the efficient processing of the litigation and the interests of justice so require."